ONTARIO
LABOUR RELATIONS BOARD
REPORTS

July/August 2011

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A Bimonthly Series of Decisions from the Ontario Labour Relations Board

Cited [2011] OLRB REP. JULY/AUGUST

EDITORS: VOY STELMASZYNSKI
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CASES REPORTED

COURT PROCEEDINGS

SUBJECT INDEX

3116-10-ES; 3160-10-ES 137077 Canada Inc. o/a Handyman Personnel Industrial Division, Applicant v. Jonathan Sullivan and Director of Employment Standards, Responding Parties; 137077 Canada Inc. o/a Handyman Personnel Industrial Division, Applicant v. Christian C.V. Villeneuve and Director of Employment Standards, Responding Parties

Employment Standards – The Employer appealed an ESO's Order to Pay for public holiday pay – The Employer was a temporary placement agency whose employees did not have a regular work schedule – Employees would indicate their availability by signing in on the morning of any day for which they wished to be assigned work; work was then assigned based on the availability of work – As the public holidays in question fell on days that would ordinarily be a working day for the employees and the employees were not on vacation, the Board found section 26 of the ESA applied – Section 26(2) prevents employees from claiming public holiday pay if they fail, without reasonable cause, to work all of the last regularly scheduled day of work before the public holiday or all of the first regularly scheduled day of work after the public holiday – The Employer argued that since the employees did not work the day before and after the holiday, they were not entitled to pay – The Board found that the circumstances in which temporary help employees work vary widely and that the exception in s. 26(2) did not apply in this case – The term "regularly scheduled" day of work does not necessarily correspond with the days of operation of the employer – Further, the employees had just cause for not working the day before or after the holiday as this was a term of their employment contract – Order to pay affirmed

BEFORE: *Tanja Wacyk*, Vice-Chair.

APPEARANCES: *Melynda Layton, René Trudel* and *Peter Bernhart* appeared on behalf of the applicant; *Christian Villeneuve* appeared on his own behalf; *Linda Bradford* and *Katherine Ballweg* appeared on behalf of the Director of Employment Standards.

DECISION OF THE BOARD: August 4, 2011

1. These files are employer applications under section 116 of the *Employment Standards Act, 2000,* S.O. 2000, c.41, as amended, (the "Act") for the review of an Employment Standards Officer's Orders to Pay outstanding wages to Jonathan Sullivan and Christian Villeneuve, the claimants.

2. Specifically, Board File No. 3116-10-ES is an appeal of Order to Pay No. 80005543-OP directing the applicant to pay wages owing to Jonathan Sullivan in the form of overtime pay and public holiday pay, as well as an administration fee pursuant to subsection 103(2). The applicant also applied for the review of Notice of Contravention #80004808-NC and the accompanying $250.00 fine, as well as Compliance Order #80005450-CO, both issued in Board File No. 3116-10-ES, and both resulting from the applicant having permitted work in excess of the maximum hours allowed under the Act.

3. Board File No. 3160-10-ES is an appeal of Order to Pay #80005717-OP directing the applicant to pay wages owing to Christian Villeneuve in the form of overtime pay, public holiday pay, and unauthorized deductions, as well as an administration fee pursuant to subsection 103(2).

4. At the outset of the hearing the applicant indicated it was abandoning its appeal of those portions of the Officer's Orders related to overtime wages, as well as the Notice of Contravention, and the Compliance Order.

5. Further, the applicant and Mr. Villeneuve reached a settlement regarding that portion of Order to Pay #80005717-OP related to unauthorized deductions. Pursuant to that settlement they are to each receive $184.50 of the monies paid into trust to satisfy that portion of the Order.

PRELIMINARY MOTION:

6. Mr. Sullivan did not attend the hearing and the applicant brought a preliminary motion that his claim be dismissed. However, as an Order has been issued with regard to his claim, the applicant bears the onus and must demonstrate the Order was incorrect. Accordingly, I declined to dismiss Mr. Sullivan's claim.

BACKGROUND:

7. Mr. René Trudel, the General Manager, testified on behalf of the applicant. His uncontroverted evidence is set out below.

8. The applicant is a temporary placement agency employing approximately 800 temporary help employees . It usually operates Monday to Friday, although some clients require labourers such as Mr. Villeneuve to work some Saturdays. Once workers are register and complete a Safety Course, they indicate their availability to work by signing in on the morning of any day for which they wish to be assigned work. Workers available for work are usually, but not always, assigned work, which is determined by the availability of work.

9. The issue in this case is whether the claimants are entitled to public holiday pay for public holidays on which they are not assigned work, without having to meet the requirements of subsection 26(2), which is set out further below.

LEGISLATIVE HISTORY:

Earlier Regime

10. Under the regime in place prior to January 2009, Regulation 285/01 expressly excluded temporary help employees from Part X of the Act, which deals with public holiday pay. Their only entitlement regarding public holiday pay was pursuant to subsection 29(2) of Regulation 285/01, which entitled them to one and one-half times their regular rate if they worked on a public holiday.

11. Those provisions were revoked by Ontario Regulation 432/08 in January 2009.

12. Following the revocation of the above provisions, temporary help employees were in the same legislative position as other workers whose entitlement to public holiday pay is governed by Part X of the Act, and specifically sections 24 - 32. Sections 24, 26, 29, and 29(2.1) are of particular interest in this instance. They are set out below:

Public holiday pay

24. (1) An employee's public holiday pay for a given public holiday shall be equal to,

(a) the total amount of regular wages earned and vacation pay payable to the employee in the four work weeks before the work week in which the public holiday occurred, divided by 20; or

(b) if some other manner of calculation is prescribed, the amount determined using that manner of calculation.

...

Public holiday ordinarily a working day

26. (1) If a public holiday falls on a day that would ordinarily be a working day for an employee and the employee is not on vacation that day, the employer shall give the employee the day off work and pay him or her public holiday pay for that day.

Exception

(2) The employee has no entitlement under subsection (1) if he or she fails, without reasonable cause, to work all of his or her last regularly scheduled day of work before the public holiday or all of his or her first regularly scheduled day of work after the public holiday.

...

Public Holiday not ordinarily a working day

29. (1) If a public holiday falls on a day that would not ordinarily be a working day for an employee or a day on which the employee is on vacation, the employer shall substitute another day that would ordinarily be a working day for the employee to take off work and for which he or she shall be paid public holiday pay as if the substitute day were a public holiday.

(2) A day that is substituted for a public holiday under subsection (1) shall be,

(a) a day that is no more than three months after the public holiday; or

(b) if the employee and the employer agree, a day that is no more than 12 months after the public holiday.

Employee on leave or lay-off

29 (2.1) If a public holiday falls on a day that would not ordinarily be a working day for an employee and the employee is on a leave of absence under section 46 or 48 or on a layoff on that day, the employee is entitled to public holiday pay for the day but has no other entitlement under this Part with respect to the public holiday.

13. In November 2009, the Act was amended to include Part XVIII.1, a comprehensive scheme dealing with Temporary Help Agencies and their employees. These new provisions

defined the employment relationship of temporary help employees, prohibited reprisals, and established new rights and obligations, including the following:

> **74.3** Where a temporary help agency and a person agree, whether or not in writing, that the agency will assign or attempt to assign the person to perform work on a temporary basis for clients or potential clients of the agency,
>
> (a) the temporary help agency is the person's employer;
>
> (b) the person is an employee of the temporary help agency.
>
> ...
>
> **74.4** (3) An assignment employee of a temporary help agency does not cease to be the agency's assignment employee because,
>
> (a) he or she is assigned by the agency to perform work for a client on a temporary basis; or
>
> (b) he or she is not assigned by the agency to perform work for a client on a temporary basis.
>
> ...
>
> **74.10** (1) For the purposes of determining entitlement to public holiday pay under subsection 29(2.1), an assignment employee of a temporary help agency is on a layoff on a public holiday if the public holiday falls on a day on which the employee is not assigned by the agency to perform work for a client of the agency.
>
> ...

14. At issue in this instance are public holidays occurring between May 26, 2009 and September 2010 and upon which Mr. Villeneuve and Mr. Sullivan were not assigned work, and did not work either the day before or after the public holiday. Specifically, the applicant challenges Mr. Villeneuve's claim for October 12, 2009, and Mr. Sullivan's claim for February 15, April 2, and March 24, 2010 as they did not work one of either the day before or the day after the public holiday.

POSITION OF THE PARTIES:

Applicant

Post January 2009 Revocation of Provisions Precluding Temporary Help Employees from Public Holiday Pay

15. It was not in dispute that following the revocation of the provisions dealing with public holiday pay for temporary help employees in January 2009, temporary help employees came under the general provisions of Part X of the Act.

16. The applicant conceded that all the public holidays at issue met the requirements of subsection 26(1), set out above, in that they fell on days that would ordinarily be a working day for the claimants, and the claimants were not on vacation those days. However, the applicant maintained that does not conclude the inquiry, in that the claimants must also not be precluded from entitlement pursuant to subsection 26(2), which provides that employees can not fail, without reasonable cause, to work all of their last "regularly scheduled day of work" before the public holiday or all of their first "regularly scheduled day of work" after the public holiday.

17. The applicant concedes the Act does not define "ordinary working day" as referred to in subsection 26(1) or "last regularly scheduled day of work" or "first regularly scheduled day of work" after the public holiday, as referred to in subsection 26(2). However, it points out that "work week" is defined in section 1 of the Act as follows:

> "work week" means,
>
> (a) a recurring period of seven consecutive days selected by the employer for the purpose of scheduling work, or
>
> (b) if the employer has not selected such a period, a recurring period of seven consecutive days beginning on Sunday and ending on Saturday.

18. The applicant argued that in this instance the regular work week is that on which assignment work is available, and is Monday to Friday, and in some instances Saturday. Accordingly, assuming subsection 26(2) applies, the applicant argues that in the claimants' situation, the "last regularly scheduled day of work before" and the "first regularly scheduled day of work after" the public holiday would be the last and first regular business day for the applicant i.e. the last and first day they have work available. Accordingly, the applicant argued temporary help employees must work those days in order to be entitled to public holiday pay. For example, if the public holiday is on a Friday, employees must work the prior Thursday and following Monday.

19. The applicant conceded its relationship with its employees is very flexible, and employees are not penalized for not making themselves available for work. However, the applicant argued the legislation should be interpreted as providing an incentive for employees to work when the employer needs workers. It maintained this is lost if the Act is interpreted as not requiring that they work the last regular business day on which work was available the day before, and the first regular business day on which work was available the day after the public holiday for which they claim payment.

20. Accordingly, the applicant argued that Mr. Villeneuve failed to satisfy the requirements of subsection 26(2) with regard to the October 12, 2009 public holiday as he failed to work the day immediately following, and there is no evidence suggesting the applicant did not have work available on that day.

Post November 2009 Amendments

21. The applicant submits the subsequent November 2009 amendments incorporating Part XVIII.1 into the Act were to remedy the fact that many temporary help agencies did not pay any public holiday pay to employees who were not assigned to work on public holidays on the basis

they did not have an "ordinary working day" as is required by subsection 26(1). Accordingly, the applicant argues the legislature created a "safety net" in the form of subsection 74.10 for these employees if they are not assigned to work on a public holiday.

22. The applicant submits that subsection 74.10 does not apply to its circumstances as it has an ordinary work week. Rather, it maintains it continues to be governed by subsections 26(1) and (2) of the Act. Accordingly, although the three public holidays claimed by Mr. Sullivan occurred after the November 2009 amendments, the applicant argued that he had failed to satisfy the requirements of subsection 26(2), and as there was no evidence suggesting it did not have work available in the days preceding and following the public holidays at issue, he had lost his entitlement to payment for those public holidays.

23. The applicant argues that in any event, section 74.10 does not create an absolute right to public holiday pay for temporary help employees. In that regard the applicant relies on the reference in section 74.10 to the public holiday falling on a day on which the employee "is not assigned by the agency", and submits it does not include circumstances where employees do not make themselves available for assignment.

24. The applicant further submitted that such temporary help workers must also meet both the requirements of Part X and Part XVIII.1 in order to establish entitlement. In other words, I understood the applicant to be arguing that in order to be entitled to public holiday pursuant to subsection 74.10 read in conjunction with section 29(2.1) such employees, for the same reasons articulated above, are still required to work their last "regularly scheduled day of work" before the public holiday or all of their first "regularly scheduled day of work" after the public holiday – although it is difficult to conceive of temporary help employees that purportedly do not have "ordinary" work days having regularly "scheduled" days of work.

25. In any event, the applicant argued that the purpose of Part XVIII.1 is to put temporary help workers on equal footing with other workers, not to provide them with "super" employee status. In that regard the applicant referred to the following excerpt from a Ministry of Labour brochure, titled "Complying with Employment Standards: What Temporary Help Agencies and Client Businesses Need to Know" regarding the amendments dealing with temporary help agencies:

> **Why change the law?**
>
> These amendments to the Employment Standards Act, 2000 (ESA) respond to the realities of Ontario's labour market. Ontario's temporary workforce often performs "temporary jobs" for extensive periods in environments where permanent workers do similar work. The changes will promote fairness and sustainable employment for temporary help agency employees. We want to be sure that temporary help agencies and their client businesses understand their new obligations under the law.

26. The applicant maintained that requiring temporary help agencies to compensate workers who refuse to provide services the day before and after a public holiday would place a higher burden on them than on other employers.

The Director of Employment Standards

Post January 2009 Revocation of Provisions Precluding Temporary Help Employees from Public Holiday

27. Regarding the October 12, 2009 public holiday claimed by Mr. Villeneuve, the Director's position is that unless Mr. Villeneuve refused all offers of assignment for that day, i.e. was on "vacation", then it would be an "ordinary working day" as referred to in subsection 26(1).

28. The Director argued that subsection 26(2) has no application to temporary help employees. The Director noted the reference to "regularly scheduled" rather than the "next work day" or the "next day", and argued that as the claimants do not have "regularly scheduled days of work", it is not possible for them to miss a scheduled work day. Accordingly, the Director maintained that Mr. Villeneuve is entitled to be paid for October 12, 2009 as a public holiday.

Post November 2009 Amendments

29. The Director pointed out that once an employment relationship is establish with a temporary employment agency pursuant to subsection 74(4)3 the relationship does not end when the worker is working for a client or not on assignment. In other words, a period of non-assignment does not trigger a termination unless the weeks of non-assignment constitute lay-off or a temporary layoff is exceeded pursuant to section 56 (see section 74.11).

30. The Director did not make the same distinction made by the applicant between agencies with a regular work week and those without. Rather, the Director argued that after November 5, 2009, when the new provisions dealing with temporary help employees were in place, subsection 74.10(1) deemed temporary help employees not assigned by the agency to perform work for a client to be on lay-off for the sake of public holidays. Accordingly, section 29 (2.1) governs rather than section 26. The Director submitted that as the public holidays claimed by Mr. Sullivan fall after the November 2009, and as he was not assigned work for those public holidays, pursuant to subsection 29(2.1) he was deemed to be on lay-off and is entitled to public holiday pay for those dates.

31. The Director denied this results in superior benefits for temporary help employees. Rather, the Director argued that these new provisions simply extend entitlement to holiday pay to all workers to reflect the work they have performed in the prior four weeks.

32. The Director submitted that the manner in which the public holiday pay entitlement is calculated addresses any perceived imbalance. Public holiday pay entitlement is governed by subsection 24(1), set out above, which provides that an employee's public holiday pay for a given public holiday shall be equal to the total amount of regular wages earned and vacation pay payable to the employee in the four work weeks before the work week in which the public holiday occurred, divided by 20 (or if some other manner of calculation is prescribed, the amount determined using that manner of calculation). In other words, the quantum of the public holiday pay is determined by the degree to which the temporary help employee actually worked in the prior four weeks.

Applicant Reply

33. In reply, the applicant pointed out that subsection 24(1) applies to the calculation of public holiday pay for all Ontario workers and not just temporary help employees.

34. The applicant also submitted that it was unreasonable to carve out sections under Part X of the Act and leave the rest, and in particular subsection 26(2). The applicant maintained that temporary help employees should be required to work the last and next day business day on which the Agency has work available.

ANALYSIS:

35. I have difficulty with aspects of both the applicant's and the Director's positions. While both the applicant and the Director made their arguments in the context of "temporary help employees" as a category or class of worker, the circumstances in which temporary help employees work vary widely. Accordingly, this decision addresses the facts in these applications only.

36. The analysis begins by recognizing the Act distinguishes between entitlement to public holiday pay for public holidays which fall on what would ordinarily be a working day (section 26) and for those which fall on what would not ordinarily be a working day (section 29).

37. Once the provisions excluding elect to work employees from Part X of the Act were repealed, their entitlement to public holiday pay was governed by those two provisions. Their entitlement was further refined by the introduction of section 74.10 (1) of Part XVIII.1

38. However, I do not agree that, as argued by the Director, following the November 2009 amendments, all temporary help employees not assigned work by their agency are governed solely by subsection 74.10 (1) of Part XVIII.1 of the Act. That provision is applicable only for the purposes of determining public holiday pay under subsection 29 (2.1), which appears to address public holiday pay entitlement only for days that "would not ordinarily be a working day" for a temporary help employee. For ease of reference, that provision is again set out below:

> **Employee on leave or lay-off**
> **29.** (2.1) If a public holiday falls on a day **that would not ordinarily be a working day** for an employee and the employee is on a leave of absence under section 46 or 48 or on a layoff on **that day,** the employee is entitled to public holiday pay for the day but has no other entitlement under this Part with respect to the public holiday.
>
> [emphasis added]

39. Accordingly, section 26 governs in circumstances where the public holiday falls on what would "ordinarily be a working day" for temporary help employees and subsection 29(2.1), read in conjunction with subsection 74.10 (1), governs in circumstances when the public holiday falls on a day that "would not ordinarily be a working day" for temporary help employees.

40. The first inquiry then, is whether the days at issue fell on what would be characterized as ordinary working days for Mr. Sullivan and Mr. Villeneuve. Ordinary working days would be days upon which they performed work, when they chose to work. Ordinary working days for

Mr. Sullivan would be Monday to Friday, and for Mr. Villeneuve, Monday to Saturday. As all the public holidays for which pay is an issue fell on either Monday or Friday, I find they fell on what would be ordinary working days for Mr. Sullivan and Mr. Villeneuve, and are governed by section 26 of the Act.

41. The applicant has conceded that Mr. Sullivan and Mr. Villeneuve meet the requirements of subsection 26(1). The issue in dispute is whether they are precluded from entitlement to public holiday pay pursuant to subsection 26(2). I find they are not.

42. The references in that subsection to "regularly scheduled" days of work or "just cause" to not work do not resonate in any way in the flexible relationship Mr. Sullivan and Mr. Villeneuve had with the applicant regarding their availability for work.

43. While counsel for the applicant urged me to interpret Mr. Sullivan's and Mr. Villeneuve's last "regularly scheduled" day of work before the public holiday and first regularly scheduled day of work after the public holiday to correspond with the applicant's days of operation, the term "regularly scheduled" day of work does not on its face, lend itself to that interpretation.

44. In addition, such an interpretation would wreak havoc with the application of subsection 26(2) in more conventional employment relationships, where for example, an employer operates different shifts over a continuous 24 operation, seven days of the week. Using the employer's days of operation interchangeably with a particular worker's regularly scheduled days means that employees who didn't work the last day/shift the employer was in operation before and the first day/shift after the holiday would arguably no longer be entitled to public holiday pay even though those days would not normally be their regularly scheduled day. That simply cannot be correct.

45. Rather, in keeping with the purpose of subsection 26(2), which was introduced to remedy the abuse of public holiday entitlements by employees who would take an extended holiday by being absent either the day before or after a public holiday or both, it is apparent the focus of subsection 26(2) is on an individual employee's scheduled work days to determine entitlement.

46. I might add that from a policy perspective, while such an "encouragement" to come to work as scheduled is entirely appropriate for employment relationships in which employers rely on a finite workforce, there is no reason to impose this requirement on a relationship such as exists in the instant case. Further, to impose such a duty would be inconsistent with the nature of Mr. Sullivan's and Mr. Villeneuve's employment relationship with the applicant, in which they are not penalized for not working under any other circumstances. Nor, I might add, is the employer penalized for failing to assign them to work in any given circumstance. Rather, in the context of this relationship, it can also be said that Mr. Sullivan and Mr. Villeneuve had "just cause" for not working the day before or after the public holiday, as that is a term of their employment contract with the applicant.

47. While the applicant's submission that the legislation should be interpreted to encourage temporary help employees to work is attractive in the first instance, again this would not only be inconsistent with the very nature of this and similar employment relationship, but such a requirement would be open to abuse by agencies who wish to avoid payment by failing to

assign workers the last day before or first day after a public holiday, resulting in potential disputes regarding the reason employees did not work. This is not an issue in more conventional work situations, or for example, where temporary help employees have been assigned to a particular employer for a designated block of time.

48. For all the reasons set out above, I find that Mr. Sullivan and Mr. Villeneuve are entitled to public holiday pay for the public holidays that are in issue, as subsection 26(2) is of no application in their particular circumstances.

DISPOSITION:

49. Pursuant to the agreement of the parties, Order to Pay #80005717-OP, issued in Board File No. 3160-10-ES, is amended to return $184.50 to the applicant. As a result, the accompanying administration fee is reduced by $18.45. For the reasons set out above, the balance of the appeal in Board File No. 3160-10-ES is denied and the balance of Order to Pay #80005717-OP is affirmed.

50. In addition, for the reasons set out above, the appeal in Board File No. 3116-10-ES is denied, and Order to Pay No. 80005543-OP, Notice of Contravention #80004808-NC, the accompanying $250.00 fine, as well as Compliance Order #80005450-CO are all affirmed.

3746-09-HS United Brotherhood of Carpenters and Joiners of America, Local 1946, Applicant v. **Action Group Inc.**, and Dan Dignard, Inspector, Responding Parties v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 593, Intervenor

Construction Industry – Health and Safety – *Trades Qualification and Apprenticeship Act* – The Carpenters were used to install certain prefabricated cup sinks and faucets in the countertop during the construction of the new laboratory – An inspector issued an Order that the work must be done by plumbers pursuant to the Regulations under the TQAA – The Board found that the installation of the sinks and faucets (by placing them in the holes and bolting them down) was a part of installing the counters themselves – Therefore, as built in fixtures, the work was carpenters' work within the meaning of the Regulations – The Board made it clear it was not concluding that the work was not plumbers' work, rather only that it was not exclusively plumbers' work according to the Regulations – Given one exception (the threading of copper lines in the hot and cold faucets was not work connected to the installation of the counters and accordingly belonged exclusively to the plumbers), the Board allowed the appeal

BEFORE: *Mark J. Lewis*, Vice-Chair.

APPEARANCES: *Jesse M. Nyman* and *Kevin Hoy* for the applicant; *Michael (Mitch) Blais* for Action Group Inc.; *Brian Fukuzawa* for the Ministry of Labour; *Laurie Kent, Larry Thompson* and *Steve Morrison* for the intervenor.

DECISION OF THE BOARD: August 31, 2011

1. This is an appeal pursuant to section 61(1) of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as amended (the "Act" and/or the "OHSA"), filed by United Brotherhood of Carpenters and Joiners of America, Local 1946 (the "Carpenters"), of two orders (the "Orders") issued by Inspector Dan Dignard, in Field Visit No. 5973583 dated March 3, 2010, to Ellis-Don Corporation ("Ellis-Don"), the general contractor for the relevant project. Action Group Inc. ("Action"), the subcontractor (to Ellis-Don) whose employees performed the work which is the subject of the Orders, has intervened in support of the Carpenters' appeal. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 593 (the "UA") has intervened in this matter in support of the Inspector and his Orders.

2. By way of background, the Board notes that, at the same time as they filed this section 61(1) appeal, the Carpenters also filed an application pursuant to section 61(7) of the Act (OLRB File No. 3747-09-HS) which resulted in the Board issuing a decision, dated April 8, 2010, suspending Inspector Dignard's Orders.

The Facts

3. The facts relevant for this application were essentially not in dispute and were generally agreed to by all of the parties.

4. As noted above, Ellis-Don was the general contractor for certain construction work being performed at the London Health Sciences Centre (the "Centre"), including the construction of a new medical laboratory on the 10th floor of the Centre (the "Project"), and Action was one of its subcontractors performing work on this Project. The work which is the subject of Inspector Dignard's Orders formed a very small part of the total work on this project and involved the installation of certain sinks and faucets in the countertops of the new laboratory. In the April 8, 2010 decision (in Board File No. 3747-09-HS) concerning the Carpenters' suspension request, the Board (differently constituted) stated the following concerning this work, at paragraphs 2 and 3:

> 2. The project involves, among other things, the construction of a laboratory on the 10th floor of the London Hospital. The construction of the laboratory has been assigned to Action Group Inc., which employs the carpenters who performed the work.
>
> 3. The work is described in the application filed by the Carpenters and is not disputed by any of the other parties. It is described as follows:
>
> > 6. On the 10th Floor of the Project a new 58,000 square foot laboratory is being constructed. Bedco Lab designed the lab and procured fixtures. Action Group has been contracted to perform the onsite work in relation to the construction of the laboratory.
> >
> > 7. The lab contains specialty counters made from epoxy. The counters include sinks and faucets. The counters are fabricated off site and delivered for installation.

8. On March 3, 2010 Ministry of Labour Occupational Health and Safety Inspector, Mr. Dan Dignard, issued an Order requiring Ellis Don/Action Group to use plumbers certified under the TSSA to "install stainless steel cup sinks" and "install reverse osmosis faucets, hot and cold water faucets and tempered water eye wash stations" [the "Work"].

9. As noted above, the Order relates to two elements of work:

(a) Affixing cup sinks to the counters; and

(b) Affixing three types of faucets to the counters;

...

14. ... First, there are no waterlines that have been run into the counters in the lab. The waterlines are being installed by plumbers after the counters are installed.

15. Second, the Carpenters are not connecting anything to any water line or future waterline. The work being performed by the Carpenters is limited to affixing the sink and faucet to the counter.

16. Third, the sinks and faucets are prefabricated. Nothing the Carpenters are doing impacts their function or integrity as a sink or faucet.

17. The work performed by the Carpenters with respect to the cup sinks is as follows:

(a) The counter has a pre-milled hole where the cup sink is to be affixed;

(b) The Carpenter places a bead of silicone around the outside of the hole;

(c) The Carpenter drops the cup sink into the pre-milled hole;

(d) The Carpenter attaches a clip to the underside of the counter which holds the cup sink in place.

This work takes less than 10 minutes to complete per sink and is performed intermittently and as needed throughout the construction of the lab.

18. The work performed by the Carpenters with respect to the faucets is as follows:

(a) The Counter has a pre-milled hole where the faucet is to be affixed;

(b) The Carpenter drops the prefabricated faucet into the pre-milled hole;

> (c) The Carpenter tightens a nut (with a washer) to the underside of the counter which holds the faucet in place.
>
> This work takes less than 15 minutes to complete per faucet and is performed intermittently and as needed throughout the construction of the lab.

5. The evidence which was called before me, while essentially confirming the accuracy of most of the above quoted paragraphs, did establish some variance from this description of the work (which is the subject of the Orders). Most significantly, the evidence confirmed that there was, as the Carpenters acknowledged, one exception to the statements that: *the Carpenters are not connecting anything to any waterline or future line*; their work *is limited to affixing the faucets to the counter*; and, *nothing the Carpenters are doing impacts on the* [faucets] *functioning or integrity as a faucet.* Specifically, it was not disputed that for the hot and cold water faucets two coppers tubes (which were later connected to the hot and cold waterlines by plumbers) had to be threaded into the faucets (prior to them being installed in the countertops). This involved the unscrewing of, and, later, the screwing back in place of, a *brass shank* at the base of each of these faucets and placing teflon tape around the threaded ends of the copper tubes before screwing them into the faucets.

6. Further, there was some contradictory evidence as to whether silicon was actually placed around the outside of all of the holes in the countertops, as the Carpenters claimed. In this respect I am prepared to believe the evidence of both of the witnesses who testified about this particular issue. Specifically, I find that, as the Carpenters asserted, silicon was supposed to be placed around all of the holes but further find, as the UA asserted, this was not always the case, presumably as a result of inadvertent errors.

The Order

7. On March 3, 2010, Inspector Dignard visited the area of the Project where members of the Carpenters were performing the above noted work. This site visit resulted in him issuing the following two specific orders concerning the performance of the work in the laboratory:

> A worker shall not carry out work in a scheduled trade unless he or she is authorized to carry out work in that trade under the *Trades Qualification and Apprenticeship Act.* At the time of the visit work was being done by Carpenters to install stainless steel "cup sinks" in the Laboratory area on the 10th floor. Upon consultation with the workplace parties and review of the skill set for Plumbers 1073 R.R.O. 1990 it was determined that the work being done shall be done by Plumbers. This order was complied with at the time of the visit.
>
> A worker shall not carry out work in a scheduled trade unless he or she is authorized to carry out work in that trade under the *Trades Qualification and Apprenticeship Act.* At the time of the visit work was being done by Carpenters to install Reverse Osmosis Faucets, Hot and Cold Water Faucets and Tempered Water Eye Wash Stations in the Laboratory area on the 10th floor. Upon consultation with the workplace parties and review of the skill set for Plumbers 1073 R.R.O. 1990 it was determined that the work being done shall be done by Plumbers. This order was complied with at the time of the visit.

In the narrative portion of the Order Form, he stated the following, in support of the above set out Orders:

> Complaint about who is installing the fixtures and sinks in the Laboratory Area on the 10th floor. Work is being done by Carpenters and the Plumbers feel that it is their work.
>
> Three separate issues have arisen from the initial complaint.
> 1) Installation of stainless steel cup sinks.
> 2) Installation of faucets for reverse osmosis water, hot and cold water, and tempered water eye wash stations.
> 3) Installation of spigots for gas, air, and vacuum.
>
> It has been determined that issue 1 for the installation of the cup sinks, and issue 2 for the installations of the faucets and eye wash station is part of the skill set for Plumbers as set forth by Ministry of Training Colleges and Universities in document R.R.O. 1990 Regulation 1073 Plumber.
>
> This document states:
> 'plumber' - mean a person who,
> (a) lays out, assembles, installs, maintains or repairs in any structure, building or site, piping, fixtures and appurtenances for the supply of water for any domestic or industrial purpose or for the disposal of water that has been used for any domestic or industrial purpose.
>
> It has been determined that issue 3 the installation of spigots for gas, air, and vacuum is not part of the skill set for Plumbers as set forth by Ministry of Training Colleges and Universities in document R.R.O. 1990 Regulation 1073 Plumber.
>
> The complaint regarding the installation of the spigots in the laboratory area should be redirected to the Technical Standards & Safety Authority (TSSA).

The Regulations

8. As all of the parties agree, this application involves the *Training Requirements of Certain Skill Sets and Trades Regulation* (O. Reg. 572/99) made under the Act, the *Plumber Regulation* (O. Reg. 1073, R.R.O. 1990) made under the *Trades Qualification and Apprenticeship Act* (the "TQAA"), and, arguably, the *General Carpenter Regulation* (O. Reg. 1056, R.R.O. 1990) also made under the TQAA. The relevant portions of these regulations, respectively, state as follows:

> **O. Reg. 572/99**
>
> 1. In this Regulation,
>
> "scheduled skill set" means a restricted skill set within the meaning of the *Apprenticeship and Certification Act, 1998* that, for the purposes of section 12 of that Act, is included in a trade or other occupation, if the trade or other occupation is listed in Schedule 1;

"scheduled trade" means a certified trade within the meaning of the *Trades Qualification and Apprenticeship Act* that is listed in Schedule 2.

...

3. (1) A worker shall not carry out work in a scheduled trade unless he or she is authorized to carry out work in that trade under the *Trades Qualification and Apprenticeship Act*.

(2) Every employer who employs a worker in a scheduled trade shall ensure that the worker is authorized to carry out work in that trade under the *Trades Qualification and Apprenticeship Act*.

(3) For the purposes of this section, a worker is carrying out work in a trade if that work is part of the trade as set out in the regulation made under the *Trades Qualification and Apprenticeship Act* and referred to in Schedule 2.

***

O. Reg. 1073, R.R.O. 1990

1. In this Regulation,

"certified trade" means the trade of plumber;
"plumber" means a person who,

(a) lays out, assembles, installs, maintains or repairs in any structure, building or site, piping, fixtures and appurtenances for the supply of water for any domestic or industrial purpose or for the disposal of water that has been used for any domestic or industrial purpose,
(b) connects to piping any appliance that uses water supplied to it or disposes of waste.

***

O. Reg. 1056, R.R.O. 1990

1. In this Regulation,
"certified trade" means the trade of general carpenter;

"general carpenter" means a person who is experienced in all of the units as defined in Columns 1 and 2 of Schedules 1 and 2;

"unit" means a subject in Column 1 of Schedule 1 consisting of the instruction set opposite the subject in Column 2 of Schedule 1 and a subject in Column 1 of Schedule 2 consisting of the instruction set opposite the subject in Column 2 of Schedule 2.

***

SCHEDULE 2
GENERAL CARPENTER

Work Experience Training

Item	Column 1	Column 2
5	Finishing (Interior)	Doors. Windows. Horizontal trims. Finished floors. Built-in fixtures. Dado and wainscot treatments. Special hardware.

The Decision

9. As is often the case with respect to orders involving O.Reg. 572/99, here Inspector Dignard's Orders and, therefore, this application, do not involve an assessment of any real hazards to health and safety which were present on this jobsite. Essentially, Inspector Dignard found the performance of the work, described in his Orders, to be contrary to O. Reg. 572/99 solely as a result of his interpretation of (two of) the regulations set out above. It was this interpretation which led him to issue his Orders, as opposed to any specific and direct safety hazards which he observed on March 3, 2010, when he visited the site.

10. My comments concerning the basis upon which Inspector Dignard came to issue his Orders are in no way intended to minimize the concerns which he identified and dealt with therein. Rather, this analysis provides the context in which the Orders must be assessed for the purposes of this appeal. Here, Inspector Dignard did not issue any orders to Ellis-Don because of the manner in which Action's carpenters were installing the sinks and faucets. Rather, he issued the Orders simply because those men were performing those tasks at all, without being licensed plumbers or registered plumbers' apprentices. In his view, the combination of Regulation 1073 and Regulation 572/99 resulted in the finding that the work in question was being performed in violation of the regulations, and therefore his specific orders requiring plumbers to perform the work were appropriate.

11. Quite simply, as plumbing is a compulsory trade, under the applicable regulations only individuals who meet the qualifications established for the plumbing trade can *safely* perform tasks which are, exclusively, the work of plumbers (save and except with respect to certain exceptions provided for in Regulation 1073, none of which apply here). Therefore, what must be determined in this appeal is – Is the installation of these sinks and faucets the exclusive work of plumbers, for the purposes of the above noted regulations? The appropriate analytical framework for making that determination was set out by the Board in its April 8, 2010 decision concerning the Carpenters suspension request (Board File No. 3747-09-HS) in which it stated the following at paragraph 11:

> 11. In analyzing this type of dispute, the Board's case-law provides the following general guidelines:
>
> (1) The work must be defined in the portion of the trade regulation that defines the trade, rather than in the portion of the regulation that defines what is required for the apprenticeship training program: *TESC Contracting Company Limited*, [2007] OLRB Rep. Aug. 817. In this case, that applies only to the Plumbers'

Regulation. The Regulation for Carpenters defines a carpenter by including all of the types of training attached as a schedule to the Regulation.

(2) If work is found in the definition of two different trades, even if one of them is compulsory and the other is not, members of either trade can perform the work: *E.S. Fox Limited*, [1989] OLRB Rep. July 738; *TESC Contracting Company Limited*, [2007] OLRB Rep. Aug. 817, and *Lockerbie and Hole Eastern Inc./Adam Clark Company Limited* (2008) CanLII 37561. I note that at paragraph 14 of its submissions, the Ministry accepts that as the appropriate method of analyzing this dispute.

(3) The interpretation of one or more regulations must be a functional one. That is, it is not sufficient to find that a general term found in one or more regulations refers to specific work simply because a general dictionary definition of the term in the regulation could lead to that result. The words in the definition of a trade must be read in the context of the nature of the work that is performed by each trade and the purpose of the TQAA: the provision of training so that apprentices and journeypersons will acquire an integrated set of skills necessary to perform the work defined in the regulation: *EllisDon Corporation* 2010 CanLII 11278 (Board File 3215-09-HS, March 3, 2010).

12. With respect to the Plumbers' Regulation, Regulation 1073, all of the questions posed by the above set out analytical framework can be answered very easily. The section of Regulation 1073 which defines the plumbing trade is section 1 and, in this (definitions) section, the work of a plumber is specifically defined to include *installing fixtures and appurtenances for the supply and disposal of water*. Further, no matter what, purposive and contextual, interpretation is given to this term, it is simply beyond dispute that the sinks and faucets which were installed in the Centre's new laboratory are fixtures and appurtenances for the supply or disposal of water, within the meaning of section 1 of Regulation 1073. Accordingly, the only real question to be answered here is - Is this work also something else, and specifically is it the installation of *built-in fixtures* within the meaning of the Carpenters Regulation (Regulation 1056), such that it falls within the definition of both trades and can, therefore, be performed by members of either one of them.

13. As set out in paragraph 11(3) of the April 8th suspension request decision, determining if the work which is the subject of the Orders is (also) the installation of built-in fixtures requires an analysis of the context in which that work was performed. In this case, that context was the construction of a hospital laboratory which was required to have (amongst other things) unique, and uniquely designed, counters. All of the parties agreed that these counters are built-in fixtures within the meaning of Regulation 1056 and that Action's carpenters were responsible for building them. As the evidence disclosed, one of the specific features which was required of these particular counters was that the countertops be even, undamaged and completely sealed. This requirement was critical in this context, that of a hospital laboratory, because of the various substances, products and chemicals etc. which the laboratory staff work with and which, therefore, might be placed on (or, more likely, spilt on) the countertops. Uneven, damaged or improperly sealed countertops could lead to substances leaking off the countertops and thereby contaminating other parts of the laboratory.

14. As noted above, the purpose-built, epoxy, countertops which the carpenters were required to install had pre-milled holes in them into which the sinks and faucets were placed, (prior to being bolted to the countertops). Because of the requirement that the countertops be properly sealed, the fit of each of the sinks and faucets in these holes had to be checked prior to the bolting-in-place. Where the fit was incorrect the countertops had to be modified by the carpenters.

15. Further, despite the best attempts of the UA to argue otherwise, the evidence made clear that there was very little possibility of these (almost entirely) pre-assembled sinks and faucets being damaged simply by being placed in the holes in, and being bolted to, the countertops. In this respect, it was also clear that the plumbers always checked that these faucets and sinks were properly mounted (for plumbing purposes, in any event) before connecting them up to the (rest of) the plumbing system and, thereafter, made sure they were functioning properly as part of the process of commissioning the plumbing system. However, as the testimony of various witnesses (including some of those called by the UA) made clear, there was a very real possibility that, if done improperly, the bolting-in-place of the sinks and faucets could significantly damage the countertops without necessarily affecting the plumbing system at all. Specifically, if the bolts were over tightened, the epoxy countertops could be cracked, and/or otherwise damaged, or, alternatively, if they were under tightened, then the faucets, in particular, might not sit properly on the countertops. In either case, such results could lead to spaces through which liquids on the countertops might leak. Unlike in a more normal setting (such as with household sinks/faucets and countertops, for example), here, in a hospital laboratory, the primary concern was not (simply) with water (emanating from the plumbing system) leaking but was rather much more focussed on the possibility of the various other liquids (being worked with by the laboratory staff) leaking through the countertops.

16. Given all of the above, concerning amongst other things, the specific requirements for these countertops, the occasional need to modify the countertops (as opposed to the sinks or faucets) when the fit was incorrect, and the very real possibility of damaging the countertops (contrasted with the very slight chance of damaging the sinks or faucets) if the bolting-in-place was not done correctly, I conclude that the installation of these sinks and faucets (by placing them in the holes and bolting them down) is part of installing the counters themselves. Therefore, as these counters are clearly built-in fixtures within the meaning of Regulation 1056, installing them, including installing the sinks and faucets, is carpenters' work within the meaning of this regulation. In making this finding, I am definitely not concluding that such work is not plumbers work. Obviously, and as clearly set out in paragraph 12 above, installing sinks and faucets is most definitely the work of plumbers under Regulation 1073 and is work which plumbers regularly perform, on a daily basis, all across this Province. However, in the specific context of this case, such work is also carpenters' work and is, therefore, not exclusively plumbers' work pursuant to the applicable regulations.

17. There is, however, one exception to my above set out findings concerning the nature of the work in issue. Threading the copper lines into the hot and cold faucets is work which was in no way connected to the installation of the counters (as the other work was). Rather, this work involved the putting together of plumbing fixtures, using copper pipes (specifically designed and intended to carry water) and teflon tape (a material primarily used by plumbers and not by carpenters) It is true that this work was comparatively simple, and could have been done off-site. However, neither of these facts changes the character of this work, involving connecting lines which are to carry water. This is work which is clearly covered by section 1 of the Plumbers'

Regulation but does not form any part of the work covered by the Carpenters' Regulation. It is, therefore, not *shared work*, but is rather work which, under the applicable regulations, only individuals who meet the qualifications established for the plumbing trade can *safely* perform.

Disposition

18. Accordingly, the Board allows this appeal, in part, and, pursuant to section 61(4) of the Act, rescinds Inspector Dignard's orders dated March 3, 2010, in Field Visit No. 5973583, save and except for that portion of Order No. 2 which relates to the threading of the copper lines in the hot and cold faucets.

1731-10-U Calvin Brian MacLean, Applicant v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 40, Responding Party v. Tobias House Attendant Care Inc., Intervenor

Delay – Discharge – Duty of Fair Representation – The complainant was discharged for alleged neglect of duty and abusive treatment of an individual in his care – The union failed to consider whether to pursue the matter to arbitration until the deadline for making a referral to arbitration had long passed – The matter was subsequently referred to arbitration and the arbitrator found the referral to be untimely and he had no jurisdiction to extend the time limit – The union did not explain this failure and the Board found the union grossly negligent in failing inexplicably to make a decision about what to do with the grievance until well beyond the time frame set out in the collective agreement – The Board directed the parties to meet with an LRO to discuss remedy leaving aside the issue of the impact of *Windsor Western Hospital* on the Board's remedial options in these circumstances, unless it is necessary to deal with that issue – Remedy to be determined – Application granted

BEFORE: *Patrick Kelly*, Vice-Chair.

APPEARANCES: *Calvin MacLean* and *Nancy Campbell* appearing on behalf of the applicant; *Philip Paul* and *David Amow* appearing on behalf of the responding party; *Andrew Reynolds* and *Andrew Jardine* appearing on behalf of the intervenor.

DECISION OF THE BOARD: August 11, 2011

1. This is an application under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") alleging a breach of the duty of representation as described in section 74 of the Act.

2. This matter proceeded by way of consultation on June 30, 2011.

3. Most if not all the material facts are undisputed.

4. The applicant (or "Mr. MacLean") was dismissed from his position as an Independent Living Assistant with the intervenor, allegedly for just cause due to neglect of duty and abusive

treatment of an individual under his care. Mr. MacLean was informed on October 1, 2008 by Murray Weber, a union steward and employee of the intervenor, that the intervenor intended to terminate him at a meeting on October 2, 2008. The applicant indicated to Mr. Weber that he wanted to grieve the termination. Mr. Weber informed Mr. MacLean that the normal protocol was to wait for delivery of the termination letter, and then file a grievance. The applicant accepted Mr. Weber's advice. He did not attend the October 2nd meeting.

5. The termination letter, dated October 2, 2008, was delivered to Mr. MacLean on October 22, 2008. It stated that his employment had been terminated effective immediately. He contacted Mr. Weber, and on October 23, 2008 Mr. Weber filed a grievance challenging the termination.

6. On October 30, 2008, the intervenor's representative, Andrew Jardine, replied in writing to the grievance. Mr. Jardine denied the grievance on the basis that the applicant had been aware of his termination on October 2, 2008, and that "[g]rievance protocol is that a grievance is supposed to be filed upon [sic] after being made aware of issue."

7. Article 9.04 of the collective agreement between the union and the intervenor in effect at the time of the applicant's discharge stated in part:

> 9.04 The following special procedure shall be applicable to a grievance alleging improper discharge or suspension of an employee who has completed his/her probationary period. The grievance may be lodged in writing to the Chairperson of the Committee to the management at Step 2 within two (2) working days after the discipline. If the decision is not satisfactory, the Union may then proceed on the giving of the prescribed notice of appeal to an impartial arbitrator selected in accordance with Article 9.03.
>
> ...

8. According to the applicant's pleadings, on November 6, 2008 Mr. MacLean received from Mr. Jardine a written offer to settle in return for, among other things, withdrawal of any grievances. Mr. MacLean informed Mr. Jardine on November 7, 2008 of his rejection of the offer to settle.

9. According to the applicant, he conferred with the union's President, David Amow, on November 13, 2008. Mr. Amow is a paid employee of the Local, which represents thirteen bargaining units, most of them, like the intervenor, in the health sector. Mr. MacLean contends that Mr. Amow did not take any statement from the applicant concerning the merits of the grievance. He also contends that Mr. Amow wrongly accused him of having returned his registered letter of termination to the intervenor, and that Mr. Amow said he had proof. These allegations were not specifically disputed by the union in its response to the application or in the course of the consultation.

10. On January 22, 2009, members of the union's Executive Board, including Mr. Amow, met to discuss what to do about the applicant's grievance. Mr. Amow provided information to the other three Executive Board members in attendance, all of whom were union stewards in bargaining units other than the bargaining unit to which Mr. MacLean belonged. Mr. Amow informed his colleagues of the reason for the intervenor's denial of the applicant's grievance, and

generally of the difficulty in challenging a termination for abuse in the health sector. He also provided them information he had obtained from Canada Post which Mr. Amow apparently believed cast doubt on Mr. MacLean's claim that he received his termination letter twenty days after it was posted by the intervenor. Mr. Amow did not provide the other members of the Executive Board with any information concerning the merits of the termination grievance. On the basis of the information that was before it, the Executive Board members decided not to proceed with the grievance, and Mr. Amow so informed Mr. MacLean by telephone.

11. At some point in February 2009, Mr. MacLean contacted the union's National Representative, Phillip Paul to see about proceeding with the termination grievance. He and Mr. Paul met in March 2009 following Mr. Paul's return from a vacation. As a result of the meeting, Mr. Paul contacted Mr. Amow and asked him to reconsider taking the grievance to arbitration. At around the same time, the union and the intervenor became involved in collective bargaining, and Mr. Paul requested the intervenor's Executive Director to consider agreeing to reinstate Mr. MacLean. The Executive Director took the matter under advisement. Meanwhile, in June 2009, the union's Executive Board reconvened, and this time Mr. MacLean attended the meeting, following which the Executive Board decided to recommend that the grievance proceed to arbitration. Mr. Paul then contacted the Executive Director to follow-up on his request for Mr. McLean's reinstatement, and at that point, the Executive Director informed Mr. Paul that the intervenor was not prepared to reinstate Mr. MacLean. Mr. Paul then suggested the matter proceed to arbitration, and the Executive Director agreed or did not object.

12. The matter was referred to arbitration, and a hearing was scheduled for November 26, 2009. Days prior to the hearing the intervenor informed the union that it intended to raise a preliminary issue concerning the timeliness of the referral to arbitration. Articles 9.03 and 10.02 of the collective agreement in operation at the time stated:

> 9.03 If management's decision is not satisfactory, the Union may refer the grievance to arbitration, provided written notice of the party's intention to refer the dispute to an arbitrator is given to the other party within ten (10) days after management's decision.
>
> Within five (5) days of the giving of written notice, both parties will exchange lists of three (3) proposed arbitrators. In the event that no name is common to both lists, either party may within ten (10) days after the lists have been exchanged request the Minister of Labour of Ontario to appoint an arbitrator and shall provide the other party with a copy of such request.
>
> 10.02 Either party may submit a grievance that has been properly processed through the grievance procedure to arbitration with the time limits referred to in article 9.03.

13. At the arbitration hearing, the intervenor's preliminary motion was argued by the parties, and Arbitrator Levinson reserved his decision. By award dated May 25, 2010 ("the Levinson award"), the arbitrator ruled that the referral to arbitration by the union was untimely having regard to the language of the collective agreement, and that he did not have the statutory jurisdiction to extend the time limit for referring the grievance to arbitration.

14. The applicant says the union's failure to refer the grievance in a timely manner constitutes a breach of section 74. The union contends that it did not violate the Act. The

intervenor says that the Board is without jurisdiction to set aside or ignore the arbitrator's award, having regard to section 48 of the Act. Furthermore, the intervenor contends that any remedy the Board might consider ought not to require the intervenor to reinstate the applicant or re-litigate the grievance or cause the intervenor to incur further legal costs.

Analysis and Conclusions

Did the union violate its duty of fair representation?

15. Section 74 of the Act reads:

> **74.** A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

16. The union did not explain to the Board why it waited until January 22, 2009 to make a decision whether or not to proceed with the applicant's grievance. It would have taken little effort to let the employer know within ten days of the denial of the grievance that the union wished to pursue the matter to arbitration, even if it had not finalized its views on whether it wished ultimately to litigate the matter. It then would have been a simple matter to withdraw the grievance at a later stage, before the hearing, if later the union preferred to abandon the arbitration. But by January 22, 2009 the deadline for making a referral of the grievance to arbitration had long since passed. There is nothing in the union's pleadings and there was nothing stated by the union in the course of the consultation in this matter to clarify why the union did not turn its mind to the critical question concerning a referral to arbitration until nearly three months after the intervenor's decision. I am left to draw an inference that the union has no good reason for the delay in coming to its own initial decision about what to do with the grievance, a decision that was made without regard to the merits of the grievance. Even if it had at that point decided to proceed with a referral to arbitration, it was well beyond the time frame in the collective agreement for making the referral. There is no reason to believe the intervenor would have been any more receptive to a late referral made in January 2009 than one made in June. The delay deprived Mr. MacLean of any opportunity to have his discharge dealt with on the merits. Needless to say, such a result from his perspective was catastrophic.

17. I therefore find that, in failing inexplicably to make a decision about what to do with Mr. MacLean's grievance until well after the time frame under the collective agreement for referring a grievance to arbitration, the union was grossly negligent. Furthermore, the length of the delay in making the referral to arbitration may well have been made worse by the union's failure at the January meeting of the Executive Board to turn its mind to the merits of Mr. MacLean's grievance. These lapses are consistent with a non-caring attitude to the applicant, with disastrous consequences to him. The union acted arbitrarily, in violation of section 74.

What is the appropriate remedy in these circumstances?

18. Subsection 48(1) of the Act contemplates that arbitration will resolve all differences between the parties, "including any question as to whether a matter is arbitrable." Subsection 48(18) states that a decision of an arbitrator or arbitration board is binding upon the parties to a

collective agreement and upon the employees covered by the collective agreement who are affected by the decision.

19. The arbitrator's decision concerning Mr. MacLean's discharge grievance was a decision that determined the grievance was not arbitrable because of the untimely reference to arbitration by the union. It was a decision that bound the intervenor, the union and Mr. MacLean. Nevertheless, Mr. MacLean asks that the Board "re-open" his grievance and refer it to arbitration.

20. In *Windsor Western Hospital Centre Inc. and Mordowanec et al.* (1986) 56 O.R. (2d) 297 a registered nurse was found by Arbitrator Palmer to have voluntarily resigned her position with the employer, and consequently her grievance alleging that she was discharged without just cause was dismissed. Subsequently, the individual brought a complaint to the Board alleging that her trade union had violated its duty of fair representation to her (as well as a complaint that the employer had violated the Act). The Board appeared to find that, based on the evidence before it, the registered nurse had been terminated. It concluded that there had been a violation of the duty of fair representation by the trade union and other violations by her employer. By way of remedy, the Board ordered the recommencement of the arbitration proceedings for the purpose of determining if the employer had just cause for termination.

21. The Board's decision was set aside on judicial review as having been made beyond its jurisdiction. In the course of his reasons on behalf of the majority of the Divisional Court, Eberle J. wrote:

> 57. While recognizing that s. 89 [now s. 116] of the Ontario Act confers wide powers on the O.L.R.B., I am unable to conclude that it authorizes the O.L.R.B. to override a final and binding decision of an arbitration board under s. 44 [now s. 48]. That is an authority given only to the Divisional Court, on an application for judicial review, and is an authority which that Court can exercise only if the arbitration board has exceeded its jurisdiction. The O.L.R.B. does not, in the present case, suggest that the Palmer board did that. In any event, no proceedings have ever been taken to attack the Palmer award by way of judicial review.
>
> 58. There is no express language in s. 89 to found the argument made by the O.L.R.B. in defence of its own jurisdiction -- nothing to suggest that s. 89 overrides s. 44; nothing to suggest that the O.L.R.B. jurisdiction exists notwithstanding the decision of an arbitration board to the contrary.

22. The intervenor submitted that, based on the analysis of the majority of the Court in *Windsor Western Hospital*, the ordering of Mr. MacLean's grievance to arbitration would be tantamount to overriding the Levinson award and would constitute acting beyond the jurisdiction of the Board. The intervenor contended therefore that referral to arbitration is precluded as a remedy in this matter. At this stage, I am not prepared to make a determination of that issue. I do note, however, that in the *Windsor Western Hospital* case, the arbitrator made a determination on the merits of the grievance. In the instant matter, there was no consideration of the merits of Mr. MacLean's discharge grievance. Furthermore, referral to arbitration is normally the primary remedy of the Board in circumstances where a trade union has not taken a grievance forward for reasons that are arbitrary, discriminatory or in bad faith: see, for a recent example, *Kinnark Child and Family Services*, [2011] O.L.R.D. No. 2556, and a decision therein cited at paragraph 13, *ITE Industries*, [1980] OLRB Rep. July 1001.

23. The union suggested at the consultation that if arbitration was not the appropriate remedy, I should dismiss the application. That would deprive Mr. MacLean of any remedy for the breach of section 74 by the union. I decline to dismiss the application.

24. Having found a violation, I direct the parties to meet with a Labour Relations Officer for the purpose of determining the appropriate remedy in this matter. If no agreement is reached on that issue, I remain seized to deal with remedy, including the referral to arbitration or a remedy in damages.

3216-09-HS United Brotherhood of Carpenters & Joiners of America, Local 1946, Applicant v. **Ellis-Don Corporation** and Dan Dignard, Inspector, Responding Parties v. International Brotherhood of Electrical Workers, Local 120, Intervenor

Construction Industry – Health and Safety – *Trades Qualification and Apprenticeship Act* – The Carpenters appealed an Order of the Inspector finding that mounting bed locator frames in hospital rooms was performed contrary to the regulations under the OHSA and the TQAA – The Board found that the primary function of the frames was to provide the precise location for the beds through the use of the fixed headboards, so that they can be easily and accurately lined up under the head walls – Although the frames included electrical fixtures, apparatus and conductor enclosures , the Board found the frames were not electrical fixtures, apparatus and conductor enclosures in and of themselves, but rather built-in fixtures – The fact that the Carpenters pulled the electrical conduit through the holes in the frames was no different from when they cut holes in drywall and pulled conduit through the drywall – Once they have pulled the conduit through the frame they did not run the conduit through the raceways or make any electrical connections – Inspector's order rescinded

BEFORE: *Mark J. Lewis*, Vice-Chair.

APPEARANCES: *Jesse M. Nyman* and *Kevin Hoy* for the applicant; *Andrew Murray*, *Rick Romkema* and *Brian Montanaro* for Ellis-Don Corporation; *Graham Williamson, John Gibson* and *Daniel Trela* for International Brotherhood of Electrical Workers, Local 120; *Joe Ferraro* for Dan Dignard, and the Ministry of Labour.

DECISION OF THE BOARD: August 9, 2011

1. This is an appeal pursuant to section 61(1) of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as amended (the "Act" and/or the "OHSA"), filed by United Brotherhood of Carpenters and Joiners of America, Local 1946 (the "Carpenters"), of the order issued by Inspector Dan Dignard in Field Visit Number 5973556 dated January 21, 2010. Ellis-Don Corporation ("Ellis-Don"), the general contractor for the relevant project, has intervened in support of the Carpenters' appeal. International Brotherhood of Electrical Workers, Local 120 (the "IBEW") has intervened in this matter in support of the Inspector and his order.

2. By way of background, the Board notes that, at the same time as they filed this section 61(1) appeal, the Carpenters also filed an application pursuant to section 61(7) of the Act (OLRB

File No. 3215-09-HS) which resulted in the Board issuing a decision, dated March 3, 2010, suspending Inspector Dignard's order (see *Ellis-Don Corp.*, [2010] OLRB Rep. March/April 262).

The Facts

3. The facts relevant for this application were essentially not in dispute and were generally agreed to by all of the parties.

4. As noted above, Ellis-Don was the general contractor for the project in question which involved constructing the (new) North Tower for the Royal Victoria Hospital in London, Ontario. The work which is the subject of Inspector Dignard's order formed a very small part of the total work on this project and involved the mounting of bed locator frames on the walls of certain rooms in the new North Tower. In the March 3rd decision concerning the Carpenters' suspension request, the Board (differently constituted) described this work as follows at pages 266-67:

> 13. Local 1946 set out in some detail the work its members do in respect of mounting the bed locators on the wall. It appears to me from the parties' submissions there is no material difference among the parties about what is done to install the bed locators. Local 1946 described that work as follows at paragraphs 7 through 10 of schedule A of its application:
>
> 7. A bed locator is a pre-manufactured headboard that is affixed to the walls of the rooms. The bed locator includes a preassembled, pre-installed electrical outlet attached to the bed locator's metal frame. The frame is attached to the way by affixing eight (8) screws or plugs at the point where the bed will be located. The frame is then covered with a prefabricated fibreglass panel.
>
> 8. There are three sets of wires encased in flexible metal conduit at the location where each bed locator is affixed. The flexible metal conduits are attached to a prefabricated head wall. The conduit was preassembled and pre-installed on the head walls and the head walls were installed by members of the Carpenters without objection for the IBEW or the Ministry. Members of the Carpenters also installed the drywall and cut holes in the dry wall for the flexible metal conduit. Members of the IBEW did pull the flexible metal conduit from the head wall through the holes in the drywall. When the bed locator frame is affixed to the wall, the employee installing the frame will have to place the metal conduit through pre-fabricated holes in the frame.
>
> 9. The employee installing the frame does not connect the wiring in the flexible metal conduit to the preassembled, pre-installed outlet on bed locator/headboard's frame. That wiring connection is performed by a member of the IBEW. The fibreglass cover is then placed on the metal frame after the conduit is wired into the bed locator's preassembled, pre-installed electrical outlet.
>
> 10. At no time during the affixation of the bed locator is there any current passing through any of the wiring. During the inspection the Inspector was satisfied of this fact.

As discussed in more detail hereinafter, the evidence which was called before me established some very minor differences to the description set out above concerning how the work was performed, and the parties certainly took issue about the exact terminology which should be used to describe certain of the physical functions being carried out, but, generally, the bed locator work (which is the subject of the Order) is as the Board described it in its March 3rd decision.

The Order

5. On January 21, 2010, Inspector Dignard visited the area of the Royal Victoria Hospital project where members of the Carpenters were performing the above noted work. This site visit resulted in him issuing the following order:

> A worker shall not carry out work in a scheduled trade unless he or she is authorized to carry out work in that trade under the Trades Qualification and Apprenticeship Act. At the time of the visit work was being done by Carpenters to mount Bed Locators in the hospital rooms. Upon consultation with the workplace parties and review of the Skill Set for Electricians it was determined that the work being done shall be done by Electricians. The order was complied with at the time of the visit.

In the narrative portion of the Order Form, he stated the following, in support of the above set out order:

> Complaint about who is installing Bed Locators. Work is being done by Carpenters and Electricians feel that it is electrical work.
>
> The unit being installed is a Bed Locator which upon examination was discovered to be an electrical raceway for power and data wiring.
>
> The work being done by Carpenters is installing the electrical raceway or Bed Locator on the wall and pulling three flexible metal conduits through the back of the raceway.
>
> It has been determined that the work being done is not a Jurisdictional issue or dispute but rather the work is part of the skill set for 309A Electricians as set forth by Ministry of Training Colleges and Universities in document R.R.O. 1990, Regulation 1051 Electrician.
>
> This document states:
> Electrician means a person, who,
> (a) lays out, assembles, installs, repairs, maintains, connects or tests electrical fixtures, apparatus, control equipment and wiring for systems of alarm, communication, light, heat or power in buildings or other structures.

The Regulations

6. As all of the parties agree, this application involves the *Training Requirements of Certain Skill Sets and Trades Regulation* (O. Reg. 572/99) made under the Act, the *Electrician Regulation* (O. Reg. 1051, R.R.O. 1990) made under the *Trades Qualification and Apprenticeship Act* (the "TQAA"), and, arguably, the *General Carpenter Regulation* (O. Reg.

1056, R.R.O. 1990) also made under the TQAA. The relevant portions of these regulations, respectively, state as follows:

Regulation 572/99

1. In this Regulation,

"scheduled skill set" means a restricted skill set within the meaning of the *Apprenticeship and Certification Act, 1998* that, for the purposes of section 12 of that Act, is included in a trade or other occupation, if the trade or other occupation is listed in Schedule 1;

"scheduled trade" means a certified trade within the meaning of the *Trades Qualification and Apprenticeship Act* that is listed in Schedule 2.

...

3. (1) A worker shall not carry out work in a scheduled trade unless he or she is authorized to carry out work in that trade under the *Trades Qualification and Apprenticeship Act*.

(2) Every employer who employs a worker in a scheduled trade shall ensure that the worker is authorized to carry out work in that trade under the *Trades Qualification and Apprenticeship Act*.

(3) For the purposes of this section, a worker is carrying out work in a trade if that work is part of the trade as set out in the regulation made under the *Trades Qualification and Apprenticeship Act* and referred to in Schedule 2.

***

Regulation 1051

1. In this Regulation,

"certified trade" means the trade of electrician;

"electrician" means a person who,

(a) lays out, assembles, installs, repairs, maintains, connects or tests electrical fixtures, apparatus, control equipment and wiring for systems of alarm, communication, light, heat or power in buildings or other structures,

(b) plans proposed installations from blueprints, sketches or specifications and installs panel boards, switch boxes, pull boxes and other related electrical devices,

(c) measures, cuts, threads, bends, assembles and installs conduits and other types of electrical conductor enclosures that connect panels, boxes, outlets and other related electrical devices,

(d) installs brackets, hangers or equipment for supporting electrical equipment,

(e) installs in or draws electrical conductors through conductor enclosures,

(f) prepares conductors for splicing of electrical connections, secures conductor connections by soldering or other mechanical means and reinsulates and protects conductor connections, or

(g) tests electrical equipment for proper function,

but does not include a person who is permanently employed in an industrial plant at a limited purpose occupation in the electrical trade.

2. (1) The certified trade is composed of two branches.

(2) Branch 1 is the trade of a construction and maintenance electrician as defined in clause (a) of the definition of "electrician" in section 1.

(3) Branch 2 is the trade of a domestic and rural electrician who performs the work of an electrician in the construction, erection, repair, remodelling or alteration of houses, multiple dwelling buildings containing six or fewer dwellings, or buildings or structures used for farming, or who performs maintenance to electrical equipment in houses, multiple dwelling buildings containing six or fewer dwellings or farms.

3. The trade of electrician is designated as a certified trade for the purposes of the Act.

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Regulation 1056

1. In this Regulation,

"certified trade" means the trade of general carpenter;
"general carpenter" means a person who is experienced in all of the units as defined in Columns 1 and 2 of Schedules 1 and 2;

"unit" means a subject in Column 1 of Schedule 1 consisting of the instruction set opposite the subject in Column 2 of Schedule 1 and a subject in Column 1 of Schedule 2 consisting of the instruction set opposite the subject in Column 2 of Schedule 2.

...

Schedule 2 General Carpenter

5	Finishing (Interior):	- Doors. Windows. Horizontal trims. Finished floors. Built-in fixtures. Dado and wainscot treatments. Special hardware.

Decision

7. As noted above, the work which the members of the Carpenters performed involved pulling the electrical conduit, installed earlier by members of the IBEW, through holes in the backs of the bed locator frames before mounting them (without their covers) on the walls. There was a dispute between the parties as to whether Inspector Dignard believed there was a chance that electrical current might be passing through any of the wiring at the time, and, therefore, as to whether his order related, at least in part, to this possibility. Accordingly, evidence was called concerning the state of the electrical wiring on the relevant floors, and in the relevant rooms, where the members of the Carpenters were mounting the bed locator frames.

8. The evidence which was called before me established that Mike Mazak, a carpenter employed by Ellis Don who installed a great many of these frames, was instructed to, and did in fact, check to see if the wires were *live*, before attempting to pull the conduit through the holes in the bed locator frames. To do this he used a small *tester* which he had been provided with by one of the electrical supervisors working on the project. Notwithstanding Mr. Mazak's checks, I am satisfied that Inspector Dignard did not believe there was a realistic possibility that any of the wiring might be live at the time when Mr. Mazak or any of the other carpenters were assigned to install the bed locator frames. The evidence of all of the witnesses made clear that before any of the carpenters began working in any of the rooms they always checked with electrical supervisors to make sure that the electricians had *locked-out* the relevant portions of the electric system and that there was no chance that any electrical current was passing through the wiring in the rooms.

9. This finding is consistent with the order which Inspector Dignard ultimately issued which focussed entirely on the work being performed being electricians' work under the relevant regulations and which contained absolutely no reference to the possibility of the conduit being live. The possibility of live electrical wires protruding from the walls of these hospital rooms would have posed a major safety risk to a great many workers, including the painters and drywall tapers who were working in these rooms at roughly the same time as the carpenters who were mounting the bed locator frames. In these circumstances, I find it impossible to believe that Inspector Dignard would have completely ignored such a serious risk, and focussed exclusively on the bed locators in his January 21, 2010 order, unless he was entirely satisfied that, prior to any work taking place in these rooms, the electricians had insured that none of the wiring was live.

10. Accordingly, Inspector Dignard's order and, therefore, this application do not involve an assessment of any real hazards to health and safety which were present on this jobsite. Essentially, Inspector Dignard found the performance of the work, described in his order, to be contrary to O.Reg. 572/99 solely as a result of his interpretation of (two of) the regulations set out above. It was this interpretation which led him to issue his order, as opposed to any specific and direct safety hazards which he observed on January 21, 2010, when he visited the site.

11. My comments concerning the basis upon which Inspector Dignard came to issue his order are in no way intended to minimise the concerns which he identified and dealt with therein. Rather, this analysis provides the context in which the order must be assessed for the purposes of this appeal. Here, Inspector Dignard did not issue any orders to Ellis-Don because of the manner in which Mr. Mazak or any of the other carpenters were mounting the bed locator frames. Rather, he issued his order simply because those men were performing that task at all, without being licensed electricians. In his view, the combination of Regulation 1051 and Regulation 572/99

resulted in the finding that the work in question was being performed in violation of the regulations, and therefore his order requiring electricians to perform the work was appropriate.

12. Quite simply, under the applicable regulations only individuals who meet the qualifications established for the electrician trade can *safely* perform the work of electricians. Under section 1 of Regulation 1051, such work includes the assembling, installing and connecting of electrical fixtures, along with installing and drawing electrical conductors through conductor enclosures. Therefore, if mounting the bed locator frames is in fact such work, as Inspector Dignard ultimately concluded was the case, then it is electricians' work which they alone can *safely* perform. Conversely, if mounting the bed locators is the installation of built-in fixtures, as the carpenters assert, then it is not electricians' work but is rather work which carpenters can, and regularly do, carry out.

13. As all of the parties noted in their arguments, many of the cases which it has decided concerning the intersection of regulations under the OHSA and the TQAA have required the Board to engage in a somewhat detailed analysis of the principles of statutory interpretation. This case, however, does not necessarily require such an approach. This is because, as its principal and simplest position, the Carpenters assert that, as a matter of fact, the bed locator frames are not electrical fixtures or conductor enclosures. Therefore, they conclude that merely mounting these frames on the walls is not work which comes within the definition in section 1 of Regulation 1051 and is therefore not work which must be performed by electricians pursuant to section 3 of Regulation 572/99.

14. The Carpenters describe the bed locators as headboards for the hospital beds and therefore as being built-in fixtures under the applicable portions of Regulation 1056. However, and as asserted by the IBEW, these are certainly not bed headboards as that term is traditionally understood. These bed locators do not form part of the structure of the beds themselves and are not even attached to the beds. In many ways the entire point of these bed locators is that they are not part of the beds but rather are objects which remain physically attached to the walls of the rooms, at specifically designed points, while the beds are moved either from room to room or within the rooms.

15. The mere fact that the bed locators are not (traditional) headboards does not, however, mean that they are, in and of themselves, electrical fixtures and/or conductor enclosures. In this respect the guide produced by Amico Corporation, the manufacturer of the particular products installed at the Royal Victoria Hospital, is particularly illustrative. It describes its product as being a *bed locator system* which is made-up of various components which include the frame (which is mounted to the wall), the enclosure (which is the cover and, when attached to the frame, functions as a headboard) and various electrical and communication devices and electrical raceways (which are contained within the frame). As Amico's guide makes clear, each particular system is designed in accordance with the needs of the particular client concerned and in accordance with *job specific shop, and as built, drawings.* With respect to the internal components of these bed locator systems, the guide states:

> Each bed locator system has shall [sic] hold up to four (4) electrical/communication devices on each side of the unit. It shall contain electrical raceways to enclose electrical wiring for each type of power (critical, normal & low voltage/communication).

16. This particular portion of the guide, concerning what each bed locator system may *hold*, is critical in determining exactly what the frames which the carpenters were mounting on the walls actually are. Specifically, these frames are simply one component of an overall system which also includes, within it, electrical fixtures, apparatus and conductor enclosures but the frames are not electrical fixtures, apparatus and conductors enclosures in and of themselves. Further, the particular internal electrical components of the bed locator systems, are, in certain ways irrelevant to their primary function. As the Carpenters pointed out in their final submissions, if all that was required in these circumstances was electrical outlets/communication devices at specific points in the hospital rooms it would be much easier and cheaper to build these straight into the walls of the rooms rather than making them part of the bed locator systems. The primary reason why bed locator systems are used at all is, as the name suggests, to provide the precise location for the beds (which are on wheels and are frequently moved between and within rooms), through the use of the fixed headboards, so that they can be easily and accurately lined-up under the head walls, which themselves contain various electrical and medical gas outlets and the communications systems, mounted on the walls above each bed's desired location. Accordingly, based on the evidence which was presented before me, the bed locator frames which the carpenters were installing are not electrical fixtures, apparatus and conductor enclosures, but are rather built-in fixtures.

17. Obviously, and as is made clear by the presence of UL (Underwriters Laboratories) labels and seals, there are electrical fixtures and electrical raceways contained within each overall (bed locator) system. All work directly involved with running the conduit through those raceways and connecting those fixtures, is quite clearly the work of electricians. However, the carpenters did not perform any of that work. At most, their only involvement with the electricians' work concerned pulling the conduit (which was protruding from the walls) through the holes in the frames. They did this solely so that they could perform their own work, mounting the frames to the walls. Thereafter, the Carpenters did not run the conduit through the raceways or make any of the electrical connections. Accordingly, such work is no more electricians' work than is the cutting of holes in the drywall and pulling (enclosed) conduit through those holes, which is work which carpenters do regularly, and without objection. This clear distinction between work associated with the mounting of the frames and work related to connecting the enclosed electrical fixtures is also reflected in the Amico guide, which contemplates, and establishes different requirements for, *installing contractors*, responsible for mounting the frames and *electrical contractors*, responsible for wiring the electrical fixtures contained within the frames.

18. As such, the mounting of the bed locator frames which was performed at the Royal Victoria Hospital project is not electrical work within the meaning of section 1 of Regulation 1051, and, such work is not work which must be performed by electricians pursuant to section 3 of Regulation 572/99. I therefore find that the order issued by Inspector Dignard concerning the performance of that work was inappropriate.

19. Accordingly, the Board allows this appeal and, pursuant to section 61(4) of the Act, rescinds Inspector Dignard's order dated January 21, 2010.

1037-11-R Bricklayers, Masons Independent Union of Canada Local 1, Applicant v. **Euro-Can Masonry**, Responding Party

Certification – Construction Industry – Employer Support – Representation Vote – The applicant submitted membership evidence that included a card belonging to the person identified as the principal of the responding party – No response to the application was filed – The Board said it could not be confident that the other individuals who signed cards at the same time as the principal did so free of the principal's influence – Although there was no evidence of threat, intimidation or coercion, the Board was not satisfied that the applicant was the "freely designated representative" of the employees – Vote ordered

BEFORE: *Lee Shouldice*, Vice-Chair.

DECISION OF THE BOARD: July 18, 2011

1. This is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") that the applicant elected to have dealt with under section 128.1 of the Act. This application was filed with the Board on June 21, 2011. The responding party did not file a response with the Board.

2. By way of decision dated June 30, 2011, I identified two concerns to be addressed by the applicant before a certificate could be issued. On July 5, 2011 counsel for the applicant filed submissions regarding those concerns.

3. The first issue is easily resolved. The applicant has now amended the bargaining unit it seeks to consist of all journeymen and apprentice bricklayers and all construction labourers in the employ of Euro-Can Masonry Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman. I find that that unit of employees is appropriate for collective bargaining.

4. The second issue is not as easily resolved. It appeared from the materials filed with the Board that this application may have been employer supported. Section 15 of the Act provides that the Board ought not to certify a trade union if any employer has participated in its formation or administration or has contributed financial or other support to it.

5. The applicant states in the application that there were three persons at work on the application filing date in the bargaining unit of employees that it seeks to represent. It filed with the Board three membership applications, each dated June 21, 2011, in support of this application. The Form A-74 executed by the union's Business Representative states that that the membership evidence filed with the Board relates to persons "who were employees of the responding party in the bargaining unit" sought by the applicant on the application filing date.

6. Amongst the membership evidence filed with the Board is a membership application that belongs to the person identified as the principal of the responding party. In my previous decision I suggested that this created an appearance of employer support for the application. At

the very least, there arises a concern that the other two membership applications filed by the union in support of this application may not reflect the true wishes of the individuals who executed them, but instead reflect the true wishes of the principal of the responding party.

7. The applicant vehemently denies that the application is employer supported. The applicant states that the mere fact that the principal of the responding party has signed a membership card in support of the applicant is insufficient to trigger the certification prohibitions contained in section 15 of the Act. Counsel notes that the membership cards filed with the Board contain a statement that each individual signing a card wishes to become a member of the applicant on the basis of his or her "own free will". It is also noted that the appropriate postings were made to inform employees of the responding party that they have the right to make a detailed statement to the Board should they desire to do so. No such detailed statement has been received by the Board. Counsel for the applicant states that in the circumstances no legitimate concern can arise that the two other membership applications may not reflect the free will of the individuals who executed them.

8. There is nothing contained in the Board File that suggests that the membership evidence relied upon by the applicant was obtained by way of threat, intimidation or undue influence on the part of the employer. No employee in the bargaining unit filed anything with the Board identifying a concern regarding the application. In the circumstances I am satisfied that all three persons for whom membership cards were filed by the applicant were members of the applicant for the purposes of the Act on June 21, 2011, the application filing date.

9. That being so, I am not as confident as counsel for the applicant that the membership evidence filed on behalf of the two individuals who are not the principal of the responding party reflects the true wishes of those two individuals. If those individuals signed their membership applications in the presence of the principal of the employer at the same time that the principal executed his membership card, it is possible that the latter's desire to become a member of the applicant caused one or both of the individuals to sign his membership card as well. Although I appreciate that it is hardly uncommon in the construction industry for supervisors, managers and owners of businesses to remain a member of a trade union should they be appointed to non-bargaining unit positions and/or start their own businesses, and that doing so does not constitute employer support for the purpose of section 15 of the Act, the fact remains that it is possible that one or both of the two above-referenced applicants may have signed membership cards in order to please the principal of the responding party. The fact that the membership application card states on its face that a person signing it does so of his or her own free will is hardly determinative of that assertion.

10. Section 2 of the Act states that one of the purposes of the Act is to facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees. On the basis of the materials filed with the Board by the applicant, and for the reasons set out above, I am not yet satisfied that the applicant is the "freely-designated representative" of the employees in the bargaining unit identified above.

11. On the basis of the information provided in the application (including the membership evidence filed by the applicant), I am satisfied that more than 55 per cent of the individuals in the bargaining unit identified above were members of the union on the date that the application was filed. However, in light of the concerns set out above, I direct that a representation vote be taken of the employees in the bargaining unit pursuant to subsection 128.1(13)(b) of the Act.

12. The parties are directed to return directly to the Vote Coordinator within one (1) days of receiving this decision a completed copy of the Vote Arrangements in the Construction Industry form (Form C-49) enclosed with this decision.

13. All individuals who were employed by Euro-Can Masonry Inc. and at work in the bargaining unit on June 21, 2011 are eligible to vote.

14. The vote will be held on July 21, 2011. Vote arrangements will be set out in the "Notice of Vote and of Meeting" to be provided to the parties by the Vote Coordinator prior to the vote.

15. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the responding party. If the principal of the responding party casts a ballot, that ballot is to be segregated from the other ballots cast and not counted. If it becomes necessary to count that ballot, a hearing will be scheduled before a panel of the Board in order to entertain the submissions of the parties regarding that issue and any other outstanding issues in this proceeding.

16. Any party or person who wishes to make representations to the Board about any issue relating to the representation vote must file a detailed statement of representations and all material facts upon which they rely with the Board and deliver it to the other parties, so that it is received within five (5) days (excluding Saturdays, Sundays and holidays on which the Board is closed) of the date on which the vote is taken.

17. The responding party is directed to post copies of this decision and the "Notice of Vote and of Meeting" (which as noted above will be provided to the parties by the Vote Coordinator prior to the vote) in a location or locations where they are most likely to come to the attention of those individuals who are eligible to vote.

18. This matter is referred to the Registrar.

1091-11-M Universal Workers Union, Labourers' International Union of North America, Local 183 on its own behalf and on behalf of its Members and Executive Board, Applicant v. **Labourers International Union of North America**, Joseph S. Mancinelli, Ronald A. Pink, Q.C. and Cosmo Mannella, Responding Parties v. Jack Oliviera and Luis Camara, Intervenors

Interference with Trade Unions – Interim Relief – Remedies – Unfair Labour Practice – Local 183 sought interim relief in an ongoing dispute with its parent union (LIUNA), claiming LIUNA committed unfair labour practices in relation to Executive Board elections contrary to section 149 of the Act – Local 183 sought a Board order suspending the results of the vote –The Board determined that the original officers of Local 183 were the proper parties to bring the application – The Board followed the three-part test set out in *Brick and Allied Craft Union v. Marble Tile and Terrazzo, Local 31* in deciding whether to exercise its discretion to grant interim relief – Although the allegations made by

Local 183 present a serious issue to be tried, they represent a weak case for the exercise of the Board's discretion. The Board held that it has no jurisdiction to supervise the internal affairs of trade unions – Although irreparable harm would be caused to Local 183 if the interim relief is not granted, this is greatly outweighed by the more significant harm caused by impeding the current operations of Local 183 and interfering with the democratic rights of its members – The case advanced is not strong enough to support such a serious remedy – Therefore the request that the election results be suspended until the completion of the case is denied – Interim Relief denied

BEFORE: *David A. McKee*, Vice-Chair.

APPEARANCES: *Doug Wray*, and *Durval Terceira* and for the Applicant; *James Robbins, Tracey Henry* and *Cosmo Manella* for Labourers' International Union of North America; *Sean McGee* for Ron Pink; *John R. Evans, K.C. Wysynski, Harold St. Croix* and *Sandro Pinto* for the Intervenors.

DECISION OF THE BOARD: July 8, 2011

1. This is an application brought under subsection 98(1) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended ("the Act") seeking interim relief in an ongoing proceeding between these same parties, Board File No. 2388-09-U ("the Main Application"). The Main Application was filed on November 10, 2009. There have been many days of litigation and more are set for October, 2011. The event that triggers this request for relief is the outcome of the regular Executive Board elections held on June 18, 2011 in Universal Workers Union, Labourers' International Union of North America, Local 183 ("Local 183"). In that vote, the slate opposing the current majority on the Executive Board (which slate includes the intervenors in this application) won by a very narrow margin. The applicant says that the result came about because of the various unfair labour practices by Labourers' International Union of North America ("the International Union"). They seek an order suspending the results of that vote and specifically the swearing in of the new Executive Board.

2. This application was filed on June 27, 2011. A consultation was set for July 5 and 6, 2011 and conducted on those days. Since the investiture or swearing in of the new Executive Board was set for Sunday, July 10, 2011, this decision has been provided in a very short period of time. Some of the facts are summarized briefly of necessity rather than choice.

3. The portions of the Act with respect to the Main Application on which the applicants rely in this interim application are sections 147 and 149 of the Act which provide in part:

> **Jurisdiction of the local trade union**
> **147.** (1) A parent trade union shall not, without just cause, alter the jurisdiction of a local trade union as the jurisdiction existed on May 1, 1992, whether it was established under a constitution or otherwise.
>
> **Notice**
> (2) The parent trade union shall give the local trade union written notice of an alteration at least 15 days before it comes into effect.
>
> ...

Complaint

(5) If a local trade union makes a complaint to the Board concerning the alteration of its jurisdiction by a parent trade union, the alteration shall be deemed not to have been effective until the Board disposes of the matter.

...

Interference with the local trade union

149. (1) A parent trade union or a council of trade unions shall not, without just cause, assume supervision or control of or otherwise interfere with a local trade union directly or indirectly in such a way that the autonomy of the local trade union is affected.

Same, officials and members

(2) A parent trade union or a council of trade unions shall not, without just cause, remove from office, change the duties of an elected or appointed official of a local trade union or impose a penalty on such an official or on a member of a local trade union.

Board powers

(3) On an application relating to this section, when deciding whether there is just cause, the Board shall consider the trade union constitution but is not bound by it and shall consider such other factors as it considers appropriate.

Orders when just cause

(4) If the Board determines that an action described in subsection (1) was taken with just cause, the Board may make such orders and give such directions as it considers appropriate, including orders respecting the continuation of supervision or control of the local trade union.

There is no basis for a finding of a possible violation of section 147. There has been no alteration of the jurisdiction, as defined by the Act, of Local 183. Section 149 is the only substantive provision relevant to this interim application.

4. In the Main Application the thesis of the applicant is that the International Union, usually in the person of Mr. Joseph Mancinelli, and perhaps other officers of the International Union, concluded that the elected Executive Board of Local 183 were not cooperating with the International Union. They allege that the International Union wishes to realign the geographic boundaries of Local 183 and the sectoral coverage of Local 183 by reducing both in favour of other local unions. (Whether or not it harbours those intentions, it has done nothing yet in that direction.) Local 183 alleges the International Union decided that because the current Executive Board of Local 183 was not cooperating they had to go and commenced a campaign to get rid of them.

5. The pleadings are enormously detailed but essentially cover three areas:

(1) The applicant alleges that the International Union, in the person of Mr. Mancinelli, first attempted to oust them by way of a

trusteeship of Local 183. This plan did not succeed because it did not gain the approval of the General President.

(2) The second group of complaints deal with a series of charges brought through an internal mechanism provided for in the International Constitution that regulates ethical behaviour by elected officers of the Union. Pursuant to that process Mr. Ron Pink conducted a number of interviews and investigations and eventually preferred charges which were to be heard before an independent third-party, the Canadian Independent Hearings Officer ("CIHO"). In the manner described below this process was suspended on October 29, 2010.

(3) The final group of complaints, all of which are contained in the interim application, with a request to add them as further particulars to the Main Application, deal with the conduct of the local election at Local 183. It is alleged that the International Union turned its efforts to interfering fraudulently in the election to ensure the defeat of an Executive Board that was not cooperating with it and to ensure the election of a different group of individuals who would.

6. The International Union has criticized the case of Local 183 as a series of shifting and conspiracy theories. I disagree. The focus of the pleadings, whatever their merits, has changed over the two years since it was first filed as new events occurred. Local 183's basic theory is that the International Union, in the person of Mr. Mancinelli, was determined to find a more pliable Executive Board for Local 183 and tried a number of different techniques to achieve that result. Local 183's submission is not a shifting conspiracy theory, but one that posits a determination on the part of the International Union to rid itself of the current Executive Board using whatever means presented themselves as opportune. I am troubled to some extent by the shifting focus from Mr. Mancinelli to other officers of the International Union, and perhaps to the Elections Office of the International Union that was involved in the vote. This shifting focus lessens the weight of the facts alleged.

Proper Parties

7. The responding parties sought to characterize this application as essentially a personal action brought on behalf of a group of unsuccessful candidates pursuing remedies of value only to themselves and seeking to cloak themselves in the mantle of Local 183 to do so. I do not accept that argument. A local union can act only through its officers. To the extent that any parent union interferes in a local union to the extent of affecting its economy, the most likely way would be to do so by undermining or seeking to impose some form of limitation on local officers or to replace those officers. The fact that the members of the Executive Board have a personal interest in these positions is self-evident, but does not affect the legitimacy of a complaint by Local 183.

8. In this case the interim application was brought after the election appeared to indicate that they had been defeated, but before the new Executive Board was installed. There have been appeals to the Elections Office about the election. The Elections Office is an office of the International Union, although one that is structured to create an independence from the

International Union, whose officers decide matters with respect to elections. The Elections Officer had rendered no decision at all when this application was filed and has still not issued a final decision with respect to those challenges. The Elections Officer filed a declaration included in the response of the International Union and a Preliminary Report on July 4, 2011, which is essentially a response to many of the allegations contained in the interim application.

9. If there has been some fraudulent activity that altered the results of a local union election, the local union itself has an interest in ensuring the integrity of its own process. An application challenging that result can only be brought by the Executive Board as it exists immediately after the election. If there is a serious issue raised suggesting that an election has been subverted or the local union defrauded, there is no reason to find that those who remain, however briefly, as officers of the local union are not able to bring the application. If indeed an election has been "hijacked" this may constitute interference in the trade union that affects its autonomy and it may bring an application against its parent union. One would hardly expect the beneficiaries of such activity to defend the Local Union's interest. Indeed, the decision of Mr. John Billi, using his authority as International Auditor, to purport to deny the Executive Board of Local 183 the authority to expend funds to bring this application against the International Union is shocking. It is hardly up to the International Union to decide whether a local union may bring an application against the International Union given the provisions of sections 147 and 149. This application was properly brought by Local 183. Indeed it is perhaps the only appropriate applicant to have brought it.

History of Interim Applications

10. There have been two other applications for interim relief sought during the course of the Main Application. The first led to a decision of the Board dated January 5, 2010. That application sought to terminate the investigation by Mr. Pink by staying or prohibiting any charges that he might lay as a result of any investigation. The Board did not grant interim relief although it found that the applicants had presented a serious case to be decided.

11. The second request for interim relief was brought in October 2010. The relief sought was essentially to suspend the hearings that were scheduled to take place arising out of Mr. Pink's charges and to suspend the upcoming elections in June of 2011. At the hearing on October 29, 2010 the parties compromised. Mr. Pink agreed to postpone the hearing of the charges against the five members of the Executive Board who had been charged. Local 183 agreed to settle its application on that basis and agreed that the Board might terminate the application.

12. At that time Local 183 was aware that elections were set for June 18, 2011. It did not pursue its application to suspend the holding of those elections despite what it regarded as violations of the Act that had occurred to that point. The responding parties assert that this is an absolute bar to seeking relief based on the allegations of events occurring up to that time. Local 183 says it should be of no consequence because it calculated that the Board would not grant such relief before a local union election in any event. It did not suggest that they shared that assessment with anyone or with the Board. I conclude that I can consider the pre-October 29, 2010 allegations for two reasons. First, they provide a context to understanding the events that occurred after that date. What Local 183 identifies as interference by the International Union may well look innocent in isolation. Local 183 sees it as part of a pattern of interference by the International Union and says that it is properly seen that way in the context of what had occurred previously. Second, even if one accepts the responding parties' argument at its highest, the most

that Local 183 could be seen to concede is that the events up to that date were not quite enough to amount to interference that affected Local 183's autonomy, but that it sat just short of that level. If that were the case, even small repetitions of that pattern would be enough to put it over the top.

13. It is, of course, impossible to say that what had occurred up to October 29, 2010 amounted to 49% or any other precise figure of what was required to constitute affecting the Local Union's autonomy. I certainly make no attempt to do so on an interim application. However, what was true on October 28, 2010 did not remain static thereafter. The first trusteeship "attempt" did not succeed, meaning that whatever vindication Local 183's leadership obtained from that decision would be known to the membership. The charges before the CIHO, though they still stood hanging over the heads of those five members of the Executive Board, were suspended. Members would not be bombarded daily with announcements about evidence or allegations that emerged at the hearings. The membership would be aware that there were ongoing proceedings challenging both the charges and the International Union's alleged instigation of those charges at the Ontario Labour Relations Board. On these facts, before the Board would intervene in the Local 183 elections there would need to be a substantial amount of "interference" alleged to justify any interim remedy. As is discussed below, Board intervention in a local union's elections is the most extraordinary remedy of all.

Legal Basis for Interim Relief

14. The parties all agreed that interim relief is a discretionary remedy that the Board may grant. There was also no dispute about the appropriate test for determining whether or not the Board would exercise that discretion. As a set out in cases such as *Brick and Allied Craft Union v. Marble, Tile &Terrazzo, Local 31,* 2007 CanLII 16241 (ON LRB), the Board should consider:

> (1) whether there is a serious issue to be tried in the Main Application;
>
> (2) whether there would be irreparable harm if the relief is not granted; and,
>
> (3) where the balance of labour relations harm and the public interest lies.

Further, the parties agreed that the Board had defined its jurisdiction with respect to an interim application in the January 5, 2010 decision at paragraph 17:

> 17. The Board in the cases referred to above has identified three categories of interim orders:
>
> 1) orders which deal with procedural matters that arise in respect of a hearing and are made under the specific power granted in sections 111 and 114 of the Act as well as under the general power contained in section 98.
>
> 2) orders which deal with procedural matters that are related to preserving the Board's process pending litigation in an application and are made under subsection 98(1)(a).

3) orders which are substantive in that they affect substantive rights of the parties pending the outcome of litigation, such as the power to grant interim reinstatement under subsection 98(1)(b).

A Serious Issue

15. The elections were held on June 18, 2011. There were two sets of elections. The first was the election of delegates to the International Convention of LIUNA in September 2011. That election is usually run by the International Union. Simultaneously the local union election to elect the Executive Board of Local 183 was held by way of a separate ballot. This election is generally run by the local union. In this case the International Union through the Elections Office played a very strong role in the running of this election as well.

16. With respect to the election of the Executive Board members of Local 183 on June 18, 2011, Local 183 alleges the following:

(a) That Mr. Mancinelli improperly expressed views orally and in writing attacking the five members of the Executive Board. This is alleged to be contrary to the International Constitution, the practice within the Union and an express undertaking on the part of Mr. Mancinelli.

(b) The election process itself was taken over and conducted by the International Union (in fact the Elections Office), even though it had the constitutional authority only to supervise the election of delegates to the International Union Convention.

(c) The balloting process was conducted contrary to the election rules in such a way that created confusion and incorrectly marked ballots;

(d) The actual voting was conducted in an improper manner such that the number of votes cast exceeded the number of ballots distributed and certain ballots were unaccounted for at the end of the day.

17. The details of these allegations present a serious issue to be tried, and certainly present allegations that, if they do engage section 149, would call for a response. In fact the International Union has provided a response. The declaration of Mr. Guerrieri and his "Preliminary Investigation" of July 4, 2011 raise a substantial defence to the allegations.

18. Local 183 has not persuaded me that it has a strong case to establish that the International Union "stepped in and ran the election at the last minute", to quote from the declaration of Mr. Terceira. The LIUNA Constitution provides that the Elections Office will rule on disputes about the conduct of an election before the election, set rules, provide training to the "Elections Judges" (who are appointed by the local union), provide advice and assistance to the local unions and hear appeals from contested elections. In this contest both slates sought pre-vote rulings and assistance from the Elections Office and received rulings on some of their complaints. The Elections Office determined the form of the ballot and granted an exception to the general

rule forbidding "block" voting. The Elections Office is ultimately an office created by the International Constitution and, although it is set up as an independent office within the International Union, is part of the parent union structure. Its involvement, however, is one that is provided for in the Constitution of the Union and was a process in which Local 183 participated willingly.

19. The Deputy Elections Officer (assisted by two lawyers from the Elections Office) supervised and to some extent actually ran the voting process on June 18, 2011. As noted, the election of delegates to the International Union Convention was conducted at the same time, and there is constitutional authority for the Elections Office to run such elections. I was not directed to any constitutional authority authorizing the Elections Office to run local union elections, although Mr. Guerrieri's declaration asserts that it is a regular occurrence. I do not have specific dates, but it is likely that the decision to take overall supervision of the election of Executive Board members of Local 183 was made very close to the election date and at a time when it was not reasonable or possible to protest, if indeed any protest was contemplated.

20. This is significant only insofar as Local 183 seeks to place the responsibility for any errors in the conduct of the vote at the foot of the International Union. This presents a problem for Local 183. Even if the errors may have occurred and were in some way the responsibility of the International Union, that does not mean that any of them constitute a violation of section 149. If the International Union deliberately set out to alter fraudulently the results of the vote, that would likely be a violation of section 149. If an officer of the International Union, or of the Elections Office failed to catch voters who were determined to resort to improper ballot stuffing or destruction, if they failed to tally the votes cast correctly, or if they failed to keep a sufficiently close eye on the voting process such that some sort of error occurred, then they might be "responsible" in some way but it is very difficult to see that they are in violation of section 149, absent factual considerations not applicable here. The evidence with respect to the alleged connection between actions on the part of Mr. Mancinelli and the Elections Office is not strong.

21. I am, of course, unable to resolve any of the factual disputes in an interim application, nor would it be appropriate to do so. It is sufficient to find that the application raises a serious issue. It is of significance however that Mr. Guerrieri's declaration and report contained factual allegations that, if true, would appear to be a good defence to some of the complaints of Local 183. Local 183 has raised a serious issue, but this case is not one that could be described as a strong one.

22. That is significant in light of the relief being sought. The Board has no inherent or general statutory jurisdiction to supervise the internal affairs of trade unions. Only sections 147 and 149 give it the authority to examine the institutional relationship between a parent union and a local union. That is, it is the interaction between the two bodies rather than the internal affairs of either one of them that the Board is to examine. Section 149(1) of course contemplates that the parent union may do something short of trusteeship or supervision or some other form of institutional control that "interferes with a local union directly or indirectly in such a way that the autonomy of the local union is affected". But what this application for interim relief seeks to do is to put the Board in the position of regulating that interaction during the election for the officers of the local union.

23. For good reasons, the Board ought to be reluctant to examine too closely the workings of a local union election. An election is fundamentally a political act. There may be rules or laws

that govern the process, but the result, as every politician and indeed most union organizers know, is unpredictable, often irrational and inherently uncertain. More than one federal, provincial, or municipal contest has been lost by persons who believed they were unfairly "robbed" of success by behaviour that was unfair or immoral. "Attack ads" offend many. Scaremongering and simple-minded slogans are infuriating to those who lose an election when such tactics appear to succeed. None of them is unlawful.

24. Local union elections are, if anything, less formal and rule-bound than an election for public office. Debates often make the worst parliamentary question period look like a collegiate debating society. What this application invites the Board do is to set standards for behaviour of an international union during a local union election.

25. I asked counsel for Local 183 what was wrong with Mr. Mancinelli's speeches and letters to members. His response was to point to a constitutional provision that prohibits a Local Union, District Council, the International Union or a body of the International Union or affiliate from endorsing a candidate, although individual persons holding those offices may do so in a personal capacity. In addition, counsel asserted that there was some form of undertaking promised by Mr. Mancinelli not to take sides or comment during the election campaign. Counsel for the International Union argued that Mr. Mancinelli was simply defending himself from accusations made. I do not accept the International Union's submission. There were certainly statements made during a press conference to the Portuguese press that attacked members of the Executive Board of Local 183. These statements are, however, part of a political debate and of a similar tone, if somewhat more legalistic, to what is said in many union election campaigns. I do not find any of his remarks inherently offensive, although they certainly represent a partisan view of the facts.

26. What this application asks the Board to do is either to investigate the "electoral culture" of LIUNA in an attempt to discern the Marquess of Queensbury rules that are accepted in this Union and apply them to these facts, or alternatively to set independent standards of behaviour in the union election campaigns. I decline to do so. It is not the role of the Board to examine the validity or appropriateness of statements made during an election campaign. Very partisan statements may succeed if they find some resonance with voters in the local union. If they do not they will likely backfire.

27. The allegations about what occurred immediately prior to and during the vote, and particularly where written rules and procedures were followed, is the kind of issue that will more likely attract the Board's interest when a parent union has an institutional hand in the running of the election. In this case the allegation raises serious issues, although the weight of those allegations is somewhat reduced by the limited amount of first-hand knowledge of either of the Declarants on behalf of Local 183. However, Mr. O'Brien alleges that he believes (based on information that he does not fully identify) that there were more votes cast than ballots handed out, and that there appear to be some ballots missing. The ballots were counted by vote-counting machines of the sort used in Toronto in municipal elections, hired from and operated by local third party suppliers.

28. The only factual response containing first-hand information was filed by the Intervenors, by way of a declaration from Mr. Sandro Pinto who was one of the Watchers (scrutineers) appointed by the challenger slate. He suggested a number of ways in which the apparent errors described by Mr. O'Brien might have occurred, but cannot be definitive. The

response of the International Union through Mr. Guerrieri's Declaration (and his July 4, 2011 Preliminary Report) while also based in part on hearsay evidence, is detailed and responsive. It negates most of the possibilities suggested by Mr. Pinto. I find his explanation of how it appeared that there were ballots missing to be logical (though obviously subject to proof). With respect to the discrepancy between the number of ballots handed out and the number of votes cast, his Preliminary Report as Election Officer describes how the ballots were counted again (again by machine). This time the tally recorded precisely the same number of votes cast and ballots distributed. His explanation is that that some ballots may not have been read by the machine the first time because the ballot may have been, contrary to instructions, marked in red or blue pen. If that is the case, surely it would have been possible to look at a sample of the ballots to see if this was true. In the absence of any more solid explanation as to why the ballot and vote counts did not match the first time, but matched exactly the second time, the International Union's response to Local 183's complaints is substantial but hardy conclusive.

29. In the end, the first issue comes to this. The allegations raised are serious and call for a response. Weighing the response offered, the case does not appear to be a strong one. This is of significance for two reasons. The limitations of section 149 are such that the Board would likely only act if the most extreme allegations of Local 183 are true, i.e. that the International Union fraudulently interfered with the election to produce a desired result. The Board might find irregularities, negligence, or improper behaviour that do not engage section 149 at all. Second, the remedy sought is likely the most serious one that the Board would ever grant with respect to sections 147 and 149. The case put forward by Local 183 does not approach the level of seriousness that such a remedy would require. Accordingly while there is a serious issue to be tried, it represents a weak case for the exercise of the Board's discretion.

Irreparable Harm

30. The harm to which Local 183 points is that if the interim relief is not granted the other slate will be installed on July 10, 2011 and will seek to withdraw the Main Application. That is true. It means that the application would not be litigated and that Local 183 would be unable to seek relief from the Board. Individual persons may of course pursue a personal remedy in the Superior Court of Justice (as indeed they are doing) but must do so at their own expense and will not have the specific statutory provision of section 149 to rely on.

31. I give no weight to the harm caused to the individual members of the Executive Board. Section 149 deals with institutional interests, not personal interests. However there is irreparable harm in the fact that, even if the individual persons are ultimately successful, Local 183 will never see the results of its application.

The Balance of Labour Relations Harm and Public Interest

32. On the other side of the ledger, the consequences are of a considerable magnitude. The results of granting the relief would severely impede the operation of Local 183 for however long it takes to finish the case. Three days are set for hearing in October 2011 and no one believes that would be sufficient to finish the case. To complete the case might take as long as one year. During that time the internal workings of Local 183 would be paralyzed. The group that apparently won the elections would function as another, unofficial source of power in the Local seeking to frustrate the actions of the Executive Board. It would know what was going on since two members of the challenging slate were on the old Executive Board. That might lead to

"secret" meetings of the other five members to seek to consolidate a position before every Executive Board meeting. The legitimacy of those in office will be called into question by many members and by the employers and employer associations with whom Local 183 bargains. There is significant harm in interfering with the democratic rights of members of Local 183 in being represented by those who were not, apparently, elected. That can be said to apply to both slates of candidates, but in this case, *prima facie*, the old Executive Board is the less legitimate choice.

33. Legitimacy is difficult enough to establish in an argumentative age. Electoral success is seen, by union members just as much as the general public of which they are a part, as establishing a kind of inarguable legitimacy. The operation of law may well disqualify a candidate after elections, or require a new election, but there is almost always a hint of technical rigidity triumphing over the bedrock of electoral legitimacy. After all, "the people have spoken". The strength of that belief is a testament to the deeply rooted democratic nature of Canadian society, no matter how many times it appears to some to be an illusion. That does not mean that the Board should shrink from granting relief when the overturning of the results of a vote is what the enforcement of legal rights requires. But before the Board should undertake such a step, in circumstances where its statutory authority to do so is narrowly circumscribed, it will require a strong and substantial case to overcome the fundamental legitimacy of electoral success.

34. The case put forward by Local 183 does not meet that standard. No one alleges that armed bands of men burst into polling stations and made off with ballot boxes. No one has found a cache of ballots ready to be stuffed into ballot boxes. No one uttered threats of impoverishment or injury or of unlawful consequences to individual voters or to the membership of Local 183 at large. Before the Board would be prepared to interfere in an extraordinary and enormously disruptive manner into an area over which it has no general or inherent supervisory jurisdiction, the allegations must be more extensive than they are.

35. Local 183 argued by way of what it described as an imperfect analogy, that the Board often nullifies or ignores the results of a representation vote in certification matters. That analogy is of little assistance. A representation vote is part of the Board's process. The Board runs the votes and has ample statutory authority for concluding that a vote does not reflect the true wishes of the employees in a bargaining unit. The Board's more limited jurisdiction found in section 149, is about processes that it does not have the authority to monitor or regulate (in fact the Superior Court of Justice does, to the extent any body does). The power of the Board in certification applications does not alter my analysis in this case.

36. The probable result of refusing to suspend the results of the election is that the Main Application will die. That probability (or certainty) points to the single reality of life for any trade union: nothing stands still. Local and international unions hold elections at regular intervals. Bargaining rights are exposed to raids and termination applications at least once every three years, and often more frequently. In situations where the primary basis of legitimacy, either for continued union representation or internal union elected office, is a vote, an inherently unpredictable electoral process, a trade union must have its eye on the calendar. The statutory stay created by section 147(5) is not available when the complaint is focussed on section 149. If remedies are to be effective, litigation must be completed before the opportunity for the exercise of fundamental democratic rights of members and employees occur. The Board's processes are not perfect, but a singularly important consideration in commencing any litigation is the reality of a timetable. An applicant may address this by any number of means: calculating how long each and every detail of its case will take to litigate; by deciding what details in a case are important to

litigate and what are not; by addressing which of the Board's processes are available and appropriate; perhaps in the degree of expedition to be sought at the outset. All of them are important ways of dealing with that reality. While the Board may not respond perfectly in every case, it has an institutional interest in ensuring that its processes are meaningful, including providing remedies in an appropriate timeframe. It is also important for parties to approach litigation with a view to seeking remedies that are obtainable within the relevant time period.

Conclusion – Primary Relief

37. In this case, I find that the harm caused by granting the relief sought greatly outweighs the harm that will be caused to Local 183's interest in this litigation. Accordingly the request that the results of the election be suspended until the completion of this case is denied.

Alternative Remedies

38. Local 183 asks, in the alternative, that the Board make other orders that would ensure that the litigation continues. These are essentially that the old Executive Board, even though not in office, must determine whether to withdraw or discontinue the Main Application or fight it through to the end; that Local 183 continue to pay the legal fees necessary; that the members of the existing Executive Board may continue to retain and instruct current counsel on behalf of Local 183; and that the responding parties, (and the new Executive Board of Local 183), may not otherwise deal with communication between counsel and members of the former Executive Board.

39. None of these remedies is appropriate. With respect to continuing to retain and instruct current counsel, that order is sought in order to deal with any potential assertion that counsel would then be in a conflict of interest since he would be acting both for, and in some senses against, Local 183. If that were the case, it is not within the Board's power to forgive or abolish a conflict if it exists. If it were to exist, the consequences of such a conflict follow automatically.

40. To grant the alternative orders sought would be to sanction the continuance of an application by persons who have no other basis for speaking for Local 183, despite the fact that Local 183, through its current Executive Board, does not wish to continue the litigation. It would require Local 183 to fund litigation over which it had no control, and in which the potential for an almost endless number of hearing days is considerable. Finally, it would require Local 183 to retain but not instruct counsel, but to have no communication with them and to be unable to review what counsel is doing, ostensibly on behalf of Local 183. This is entirely unworkable. Litigation is a means to an end; it ought not to assume a life of its own. The alternative relief is also denied.

Relief sought by Labourers' International Union of North America

41. The International Union sought orders dealing with any fees payable to counsel acting in this matter on account of this application. It sought to have the fees payable held in escrow and not paid to counsel without the consent of Local 183 and in fact to refund the fees to Local 183 in the event that the new Executive Board does not consent to payment after the election appeals are heard by the Elections Office. Even if the Board had jurisdiction to grant such relief I would not do so. That would essentially put the Board in the position of determining issues such as the

formation of contract between counsel and Local 183 (which is surely not the business of the International Union), perhaps the quantum of the bill, and the entitlement of counsel to be paid for the work they have done on behalf of Local 183. There are a group of Masters in the Superior Court of Justice who deal with such matters, as well as the civil courts in general with respect to the collection of debts, and the Board has no business setting up a parallel process, and likely no jurisdiction to do so.

Conclusion

42. This application for interim relief is dismissed in its entirety. The main relief sought by Local 183 is dismissed as is the alternative request for relief. The remedies sought by the International Union are also dismissed.

2091-03-R United Food and Commercial Workers Union, Local 175, Applicant v. **MGI Packers Inc.; Maple Freezers Limited; Continental Trading Company Limited; Continental Meat Packers Inc.; Continental Trading Company Inc.; Maple Freezers Inc.; Burnstar Financial Holdings Inc.; Henry Muller; 1553602 Ontario Limited; Richard Clare; Gencor Foods Inc.; 1553603 Ontario Limited,** Responding Parties

Related Employer – Sale of a Business – Stay – Union Successor Rights – The union applied to have existing bargaining rights recognized under s. 1(4) and/or s. 69 of the *Labour Relations Act, 1995* – One of the respondents was an undischarged bankrupt – It was argued that proceedings should be stayed pursuant to s. 69.3(1) of the *Bankruptcy and Insolvency Act* which prevents a creditor from engaging in proceedings against a debtor or a debtor's property for the recovery of a claim provable in bankruptcy – The Board found that a mere claim by a union to preserve its pre-existing bargaining rights with a successor employer did not justify a stay in proceedings – Proceedings under s. 1(4) and/or s.69 are not proceedings for the recovery of a claim provable in bankruptcy despite previous Board jurisprudence – Where the trade union or the applicant claims further or additional relief which may involve recovering funds or requiring payment from the bankrupt, then the impact of the BIA, the necessity of a stay and requirement for the union to seek the approval of the bankruptcy court can be considered – Matter continues

BEFORE: *Bernard Fishbein*, Chair.

DECISION OF THE BOARD; August 2, 2011

1. This is an application under section 69 and/or subsection 1(4) of the *Labour Relations Act, 1995*, as amended (the "Act") which was originally filed on October 3, 2003. This application unfortunately has a lengthy and sporadic history as the applicant has added new additional responding parties. Hearings have commenced and ceased as some of these responding parties have apparently ceased to carry on business. It appears that an actual hearing was last held in November of 2007.

2. On April 6, 2011, the applicant wrote to the Board indicating that a new responding party, 225875 Ontario Inc. carrying on business as Arnold Meat Packers ("Arnold") now

appeared to be "operating the business" at the former location and wished to have them added as a party to the application. The applicant also requested the scheduling of a case management conference to deal with the application. The Board complied with this request and a case management conference was scheduled for June 22, 2011.

3. On June 21, 2011, the Board received communication requesting the hearing be adjourned because of the illness of counsel for Arnold. As a result, that case management conference was adjourned.

4. Because the delay and ultimate conclusion of this application was of concern, by decision dated June 27, 2011, the Board directed that Arnold file a response (or at minimum, its position with respect to being added as a responding party) and consult among each other with respect to dates so a case management conference could be rescheduled.

5. On June 29, 2011, Arnold filed a request for reconsideration seeking the rescission of the Board's decision of June 27, 2011. The applicant was given an opportunity to make submissions with respect to this reconsideration request and it has done so. As well, Arnold has made submissions in response to the applicant's submissions.

6. Essentially, Arnold argues that pursuant to section 69.3 of the *Bankruptcy and Insolvency Act* ("BIA"), the Board's proceedings must be stayed until the applicant obtains leave of the bankruptcy court. It notes that one of the alleged predecessor employers (and in fact a party added by the applicant after the initial filing of this application), Gencor Foods Inc. ("Gencor") became a bankrupt by proceedings commenced June 14, 2008, and has not been discharged. A copy of the bankruptcy search was attached to the reconsideration request. At the time of issuing its decision of June 27, 2011, the Board was not fully aware of any bankruptcy filing. The applicant does not appear to dispute the accuracy of the assertion that Gencor is an undischarged bankrupt.

7. Section 69.3(1) of the BIA provides:

> "Subject to subsections (1.1) and (2) and section 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property or shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy."

8. Arnold asserts that an application under section 69 or subsection 1(4) of the Act is an action or proceeding "for the recovery of a claim provable in bankruptcy" and should therefore be stayed pursuant to the BIA. Arnold refers the Board to its prior decisions, *George Hancock Textiles Ltd.*, [2005] OLRB Rep. January/February 64 and *Page Flooring Enterprises Inc.*, [2002] OLRB Rep. November/December 1144, and the cases cited therein where this was the result.

9. Indeed it is fair to say that the prior Board jurisprudence lends significant support to the assertion of Arnold. However, in the Board's view, that jurisprudence bears re-examination and further scrutiny.

10. The jurisprudence was extensively reviewed most recently in the *Hancock Textiles Ltd.* case, *supra*, relied upon by Arnold. The Board summarized the prior jurisprudence as follows:

> "29. The cases in this area appear, upon the first review of them, to arrive at inconsistent results. Previous Board decisions have stayed proceedings such as these. However, some recent Court decisions have not stayed proceedings similar to these. The Board finds that these cases can be reconciled on the basis that the proceeding is stayed if allowing the proceeding to continue would be disruptive to the purposes of the BIA. If allowing the proceeding to continue could have the effect of granting the applicant an advantage in the collection of its debt that is inconsistent with the distribution of the bankrupt's assets to all the creditors as required by the priorities and procedures set out in the BIA, the cases rule that the proceeding in question is a proceeding "for the recovery of a claim provable in bankruptcy" and therefore the proceeding is stayed. Where it is found, as a fact, that the proceeding in question does not include a claim for the recovery of a debt against the bankrupt, but rather only seeks to bind the successor employer to the collective agreement the union had with the bankrupt employer, the Courts have not stayed the proceedings. In these cases, the Courts have stated that allowing the proceeding to continue would not be disruptive to or inconsistent with the purposes of the BIA ..."

11. In the Board's view, this is a correct statement of the law and how it should be applied. Unfortunately, it does not appear that in their end result all of the cases have adhered to these principles.

12. As section 69.3 of the BIA makes clear, it applies to **creditors** commencing or continuing any action or proceeding against the **debtor** or the **debtor's property** for **the recovery of a claim provable in bankruptcy.** On a literal reading of these words, it is difficult to discern how a mere claim by a union to preserve its pre-existing bargaining rights with a successor employer (bankruptcy notwithstanding) can be said to be that of a creditor, against the debtor or the debtor's property, for the recovery of a claim provable in bankruptcy.

13. Remarkably, the Courts appear to have been more sensitive to this than the Board jurisprudence. In *Saan Stores Ltd.*, (1999) 172 D.L.R. (4th) 134, the Nova Scotia Court of Appeal had to deal with the interaction of Section 31(1) of the *Nova Scotia Trade Union Act* (the successor rights provision of that statute, parallel to Section 69 of the Act) and the BIA. The Court of Appeal refused to overturn a Nova Scotia Supreme Court decision upholding a Nova Scotia Labour Board decision that granted a successor declaration in the face of the bankruptcy of one of the predecessor employers. The Court of Appeal stated:

> "56. In arriving at this conclusion I have also rejected the appellant's submission that sections 69.3(1) and 215 of the BIA had application to the question before the Board. The appellant submits that the Board ought not to have entertained the union's application.
>
> 57. For ease of reference I will again set out the provisions of s. 69.3(1):
>
> > 69.3(1) Stays or proceedings – bankruptcies – Subject to subsection (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.

58. The union representing the employees of Saan did not file a claim for the employees against the bankrupt or its property that was provable in bankruptcy such as would be a claim for wages due at the date of the bankruptcy. The proceedings before the Board were not brought against the trustee by a creditor with a claim provable in bankruptcy. The union, on behalf of the employees, did not seek a remedy against the debtor or the debtor's property. The remedy sought was an order that would bind Saan to the terms of the collective agreement. The purpose of s. 69.3(1) of the BIA is to prevent creditors from seeking remedies against the debtor's property or commence actions for the recovery of a claim provable in bankruptcy other than in accordance with the procedures provided for in the BIA. An application under s. 19(1) of the *Trade Union Act* which engages s. 31(1) of that Act does not fit within the type of proceedings contemplated in s. 69.3(1) of the BIA. These sections of the *Trade Union Act* create a mechanism to protect the rights of employees as contained in the collective agreement if the employer's business is sold or transferred. The obligations of a purchaser of an employer's business that flow from s. 31(1) of the *Trade Union Act* are not obligations of the predecessor employer and, therefore, do not give rise to a claim provable in bankruptcy. In my opinion, s. 69.3(1) of the BIA was not engaged when the appellant union applied for a declaration that Saan was a successor employer within the meaning of s. 31(1) of the *Trade Union Act*.

59. Although I have concluded that s. 69.3(1) of the BIA was not engaged on the application to the Board, I will nevertheless deal with the appellant's submission that s. 31(1) of the *Trade Union Act* conflicts with s. 69.3(1) of the BIA and, therefore, he submits, s. 31(1) must give way to the provisions of s. 69.3(1) of the BIA.

60. In *Her Majesty the Queen v. Sobeys Inc.*, C.A.C. No. 148131, December 4, 1998, Cromwell, J.A. of this Court in commenting on the doctrine of paramountcy stated at p. 3:

> The test for determining whether there is conflict was set out by the Supreme Court of Canada in *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161 and reiterated in *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59 and *Irwin Toy Ltd. v. Attorney General (Quebec)*, [1989] 1 S.C.R. 927. In *Multiple Access*, Dickson, J., as he then was, said at page 191:
>
> > In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. (emphasis added)

61. The provisions of s. 31(1) of the *Trade Union Act* are not in conflict with s. 69.3(1) of the BIA as there is no actual conflict in their operation. The proceedings before the Board did not engage s. 69.3(1) of the BIA for the reasons I set out above. The provisions of s. 31(1) of the *Trade Union Act* are within the legislative power of the provincial Legislature and as there is no actual conflict there is no issue of paramountcy of the federal legislation over s. 31(1).

> 62. Section 215 of the BIA has no application whatsoever to the proceedings heard by the Board. Section 215 simply prevents, without leave of the court, actions against the Superintendent, an official receiver, an interim receiver or a trustee. The purpose of s. 215 is to ensure that the purposes of the BIA can be carried out properly by the trustee and the other bankruptcy officials named without the undue intervention of other proceedings. The application to the Board did not involve the trustee in any way.
>
> 63. To interpret s. 69.3(1) of the BIA so as to render ineffective s. 31(1) of the *Trade Union Act* is unnecessary to protect the rights of creditors of a bankrupt and, more importantly, unnecessary to facilitate the distribution of funds realized from the orderly disposition of the bankrupt's assets. These are primary objectives of the BIA. Both s. 69.3(1) of the BIA and s. 31(1) of the *Trade Union Act* can operate within the legislative objectives of both provisions without encroaching upon either federal or provincial legislative powers."

14. Equally, the Supreme Court of Canada was called upon to comment upon the interaction of successor applications under the Act in Ontario and the BIA in *GMAC Commercial Credit Corp. – Canada v. T.C.T Logistics Inc.*, [2006] 2 S.C.R. 123. The Supreme Court overturned the lower courts on the standard in issuing a stay under section 215 of the BIA (action against receivers or trustees) and the scope of section 47 of the BIA (allowing courts to give interim receivers certain authority), but the comments of the majority on the interaction between proceedings under section 69 and/or 1(4) of the Act and the BIA are still instructive:

> "47. The effect of section 72(1) is that the *Bankruptcy and Insolvency Act* is not intended to extinguish legally protected rights unless those rights are in conflict with the *Bankruptcy and Insolvency Act*. The right in issue here is the right found in section 69 of the Ontario *Labour Relations Act, 1995* to seek a declaration that a subsequent employer is bound by the employment obligations found in the collective agreements of its predecessor. I agree with Feldman J.A. who concluded:
>
> > . . . the first half of [section 72] clearly states that the BIA will not abrogate or supersede any provincial law unless that law is in conflict with the BIA. The language of section 47(2) of the BIA does not conflict with the successor employer sections of the LRA and therefore does not abrogate or supersede that Act.
>
> ...
>
> 49. This means the labour board has exclusive jurisdiction to make a successor employer determination. It is difficult to see how the right to seek such a declaration conflicts in any way with the bankruptcy court's authority under section 47(2) to direct and supervise the interim receiver's effective management of the debtor's assets.
>
> ...
>
> 51. If the section 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all employment rights if the bankruptcy court thinks it "advisable" under section

> 47(2)(c). Explicit language would be required before such a sweeping power could be attached to section 47 in the face of the preservation of provincially created civil rights in section 72…

15. The Board is aware that in its own previous decisions it appears to have characterized a section 1(4) and/or section 69 proceeding as a "proceeding for the recovery of a claim provable in bankruptcy". The reasoning appears to be because it:

> "… is not difficult to appreciate that being bound to a collective agreement may well give rise to a monetary claim provable in bankruptcy…."

See *Page Flooring, supra*, at paragraph 11. Or equally because:

> "Even though the primary purpose of an LRA section 1(4) declaration is to bind the related employer to the collective agreement, this does not detract from the fact that a secondary purpose, and commonly an important purpose, for obtaining a related employer declaration is to enable the union to also recover debts of the original employer against the related employer. This would also be a reason for seeking the ESA section 4 related employer declaration. The Board does not consider the potential for debt collection to be only ancillary so as not to trigger section 69.3(1). As such the Board considers these proceedings to amount to proceedings "for the recovery of a claim provable in bankruptcy".

See *George Hancock Textiles Ltd., supra*, at paragraph 36. This line of reasoning has apparently led to the conclusion that even when a trade union renounces at the outset any intention for any relief other than a successor declaration against a successor employer, the Board may still stay the section 1(4) and section 69 proceedings.

16. With all due respect, the Board does not find this reasoning persuasive any longer. There is no point to such a tortured characterization of section 69/1(4) proceedings as proceedings against the debtor for recovery of a claim provable in bankruptcy. Moreover, it is not consistent with what the earlier Board cases and the courts have all agreed is the real purpose of the BIA. See, for example, paragraph 29 of *Hancock Textiles* previously quoted at paragraph 10.

17. To remain consistent with the purposes of the BIA, there is no need for such a heavy-handed approach as staying all section 1(4) and/or section 69 proceedings at the outset merely because it involves a predecessor employer that may or may not be in bankruptcy. The delay (or further delay) inherent in a leave application to the Bankruptcy Court ought not to be automatically imposed on a representational claim for bargaining rights with a successor employer which even the Courts concede is the exclusive jurisdiction of the Board (although the Board concedes the irony of such an observation in this case).

18. Rather, a more nuanced approach can be adopted that is consistent with the purposes of the BIA and the successor rights provisions of the Act (which is the exclusive jurisdiction of the Board as noted by the Courts). There seems to be no reason why the Board cannot proceed with the section 69/1(4) declaration at least insofar as it relates to the declaration of the bargaining rights against the successor corporation. If the trade union or the applicant claims further or additional relief which may involve actually recovering funds or requiring some payment from the bankrupt (for example, a section 133 application that seeks to obtain an order

for the payment of monies), then the impact of the BIA and the necessity of a stay and compelling the union to seek the approval of the bankruptcy court can be considered. The fear that a section 69 and/or 1(4) declaration may be the "launching pad" for claims against the bankrupt once the 69/1(4) relief has been granted (which may or may not come to pass – and which relief is not necessarily an issue at this stage of the proceedings) does not justify staying or refusing to entertain any section 69 or 1(4) application at the outset when all that may be sought is a declaration concerning bargaining rights applying to a successor employer. That is certainly not what the Courts have directed the Board to do. If that eventuality does come to pass, and such a claim is actually made, it can appropriately be dealt with at that time.

19. Accordingly, for these reasons, the Board will refuse to reconsider its decision. Arnold again is directed to either file a response or minimum state its position concerning being added as a party to this application within 10 days of the date of this decision. Again, the parties are directed to consult and advise the Board about dates for the scheduling of a pre-hearing conference in this matter, or the Board will do so.

20. None of the foregoing is intended in any way to comment on the merits of the application under section 69 and/or 1(4) of the Act, and whether any relief at all will actually be granted in that application. Nor is it intended to indicate the position of the Board should the applicant's request for relief extend beyond the mere declaration of successorship. At that point in time, issues of the stay and the impact of the BIA can be raised and will be considered by the Board.

0942-11-PR Sarnia Construction Association as agent for NOVA Chemicals, Applicant v. International Brotherhood of Boilermakers, Iron, Shipbuilders, Blacksmiths, Forgers and Helpers, Local Union 128, Brick and Allied Craft Union of Canada, Local 23, United Brotherhood of Carpenters and Joiners of America, Local 1256, Operative Plasterers' and Cement Masons International Association of the United States and Canada, Local Union 598, International Brotherhood of Electrical Workers, Local 530, International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, Labourers' International Union of North America, Local 1089, Millwrights United Brotherhood of Carpenters and Joiners of America, Local 1592, International Union of Operating Engineers, Local 793, The Ontario Council of the International Brotherhood of Painters and Allied Trades Local Union 1590, Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union 124, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 663, Refrigeration Workers Local Union 787, Rodmen International Association of Bridge, Structural and Ornamental Ironworkers Local Union 700, Roofers Sheet Metal Workers International Association Local 539, Sheet Metal Workers International Association, Local 539, Sprinkler Pipefitter Ontario Pipe Trades Council Local 853, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local Union 879, Marble Tile and Terrazzo Workers Brick and Allied Craft Union of Canada Local Union 23, Responding Parties

Construction Industry – Project Agreement – The Local gave a timely notice of disapproval of the project agreement pursuant to s. 163.1(8) – The project agreement proposed that the application of the Provincial Collective Agreements to the project would be amended by a reduction in wages by 5% and a standard work week of five, 8 hour days with overtime only after 40 hours – The Local argued the Project Agreement created a greater rate of reduction in "total wages and benefits" paid to its members compared to other trades – The Board agreed with the conclusion in *Shell Canada Products* that the application of a straight percentage reduction to employees who have their normal work week increased with premium pay becoming payable only after they work in excess of the lengthened work week, increases the proportional reduction of their total wages and benefits – The Board rejected other arguments from SCA that the Local was improperly benefiting by its objection or it was acting in bad faith when it noted that there could be nothing improper about a trade union seeking to obtain a result that is mandated by the Act – The Board concluded that the proper manner in which to determine the proportionate reductions in the total wages and benefits of each group of employees represented by a trade is to calculate the total of all hourly payments (other than payments to an employer association fund) that an employer must make under a Provincial Collective Agreement in respect of each hour of work performed by a bargaining unit employee, as compared to the payments an employer is obliged to make for each hour of work of a bargaining unit employee under the Project Agreement, assuming the employee in both cases works a full 40 hour week – Further submissions directed

BEFORE: *David A. McKee*, Vice-Chair.

APPEARANCES: *Walter Thornton, Herbert Law, Erich Schafer* and *Andy Pilat* appeared on behalf of Sarnia Construction Association as agent for NOVA Chemicals; *Ron Lebi, Mick Cataford* and *Katherine Ferreira* appeared on behalf International Brotherhood of Electrical Workers, Local 530.

DECISION OF THE BOARD: August 24, 2011

1. This decision deals with litigation over the implementation of a Project Agreement as defined in section 163.1 of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "Act") at the facilities of NOVA Chemicals ("NOVA") in Sarnia. The proponent of the project is the Sarnia Construction Association ("SCA") as agent for NOVA. The process mandated by section 163.1 was followed, and by decision dated August 5, 2011 the Board found that the Project Agreement had come into force, subject only to a determination of a claim by International Brotherhood of Electrical Workers, Local 530. That caveat was made because IBEW Local 530 had given a timely notice of disapproval pursuant to subsection 163.1(8) paragraph 1. No other trade has sought a variation or amendments to the Project Agreement.

2. IBEW Local 530 has made an application under subsection 163.1(9). The relevant provisions are:

> (9) A bargaining agent on the list that did not give notice of approval of the proposed project agreement may challenge the proposed project agreement by giving notice to the Board within 10 days after the Board receives the evidence described in paragraph 5 of subsection (8) and the following apply with respect to such a challenge:

1. The Board shall make an order either declaring that the proposed project agreement is in force or declaring that the proposed project agreement shall not come into force.

2. Paragraphs 3 and 4 apply if,

   i. the bargaining agent challenging the proposed project agreement gave notice of disapproval of the project agreement, and

   ii. the proposed project agreement would result in a reduction in the total wages and benefits, expressed as a rate, of an employee represented by the bargaining agent challenging the project agreement that is larger, proportionally, than the largest reduction that would apply to an employee represented by a bargaining agent that gave notice of approval of the project agreement.

3. In the circumstances described in paragraph 2, the Board shall make an order doing the following, unless the Board considers it inappropriate to do so,

   i. amending the proposed project agreement so that no reduction in the total wages and benefits, expressed as a rate, of an employee represented by the bargaining agent challenging the project agreement is greater, proportionally, than the largest reduction that would apply to an employee represented by a bargaining agent that gave notice of approval of the project agreement, and

   ii. declaring that the proposed project agreement, as amended, is in force.

3. The Project Agreement proposes that the terms and conditions of employment contained in each of the Provincial Collective Agreements for each bargaining agent would apply to the project with the following amendments:

(1) all wages are reduced by 5%;

(2) no change would be made to any other payment in respect of hourly work to pension, health and welfare, and union funds;

(3) the standard work week would be 40 hours per week composed of 5 days of 8 hours each; overtime would be paid only after those hours.

The issue respecting calculation

4. The issue in this case is the application of Paragraph 2ii of subsection 163.1(9). In this case, IBEW Local 530 (the "IBEW") argues that the Project Agreement creates a greater rate

of reduction in the "total wages and benefits" paid to its members when compared to the total wages and benefits paid to members of other trades, specifically the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local 853 (the "Sprinkler Fitters"), the Sheet Metal Workers International Association Local 539 (the "Sheet Metal Workers"), and the International Association of Heat & Frost Insulators & Allied Workers, Local 95 (the "Insulators").

5. The IBEW argues that the proper method of calculating the total wages and benefits is to take a 40 hour work week, with all wages and benefit contributions as a set out in the Provincial Collective Agreement and to compare that as a rate to the total wages and benefits paid under the Project Agreement in order to determine the percentage reduction. In this case, a 5% reduction to the wage rate results in a different percentage reduction in the total compensation package for one week for each trade.

6. The exact division between wages and the non-wage contributions to employee and union funds is different under each Provincial Collective Agreement. Further, some such agreements require overtime to be paid after 36 hours in a week (some at time and a half and some at two times the rate) and some mandate a 40 hour week composed of five 8-hour days. Hence a 5% reduction of the wage rate represents a different figure if one looks at the total payments made over the week. It argues that it receives a 12.9% reduction under the Project Agreement compared to 7.9% for the Insulators, 11.19% for the Sheet Metal Workers, and 12.68% reduction for the Sprinkler Fitters (using local union members).

7. The SCA argues that the 5% reduction of the basic hourly wage rate is equal among all trades and that that is all that the Board should examine. On that basis, all trades experienced a reduction in wages of 5% and the Project Agreement results in no variation at all.

8. The Board dealt with the manner in which to calculate the rate of reduction in two decisions involving the same Project Agreement: *Shell Canada Products,* [2001] OLRB Rep. July/August 1075 and *Shell Canada Products,* [2001] OLRB Rep. September/October 1243. It came to the conclusion that the Board should base the comparative reduction on a calculation of the difference in the total number of dollars paid to or on behalf of an employee to the employee or to a union or employee benefit fund for 40 hours of work in one week under the Provincial Collective Agreement on one hand and under the Project Agreement on the other.

9. The SCA argues that the Board had reached a conclusion in those cases that was a reasonable one (particularly given that the argument made before me was different from the one made to a different panel of the Board in 2001) but that ultimately the decision is wrong, not in keeping with the intent of the amendments to the Act that introduced section 163.1, and ignores the practical application of the Act to the real world of construction collective agreements.

10. The SCA asserts, correctly, that the structure of each of the Provincial Collective Agreements is very similar. Monetary compensation is paid at an hourly rate, divided between wages (plus 10% of that rate for vacation and holiday pay) and money that is paid to other funds that are not directly or immediately accessible by employees: pension, health and welfare, union promotion funds, stabilization funds, etc. If a trade union is prepared to modify the remuneration its members received, it will generally do so only with respect to the rate of wages paid to its members. The health and welfare and pension premiums operate on the basis of units of a fixed amount, and the various pension and insurance plans are impossible to administer on any other

basis. This is particularly so since there will be contributions at the full rate under the Provincial Collective Agreement for work performed elsewhere than under the Project Agreement, which will be paid to the same trust funds. The other contributory payments (union dues, organizing funds, etc.) go to funds which might not require the same degree of uniform contribution, but it might be difficult and expensive for the administrator who receives the funds to properly divide and allocate. Wages paid directly to employees are the most flexible item in the package.

11. In keeping with that reality, the SCA proposed a 5% reduction of all wage rates and the maintenance of the benefit levels under each agreement. The SCA argued that this was in keeping with Paragraph 2ii because all trades under the Project Agreement had their wages reduced by 5.0% and all other payments reduced by 0.0% and the hours of work (40 per week) were standardized. It argued that this was the only practical way of applying Paragraph 2ii because of the relative inelasticity of the non-wage components of compensation. Further, to suggest for example a 4.72% reduction for the Sheet Metal Workers, a 4.5% reduction for the Insulators, a 5.2% reduction for the IBEW and a 5.63% reduction for the Sprinkler Fitters stood no realistic chance of acceptance by the trades. The appearance of differential treatment for different trades would doom any proposal.

12. The SCA argued that a purposive approach to the Act in this context could only lead to an equal percentage wage reduction for all employees. Every member of every trade union would be undergoing the same relative reduction in wages. This, it argues, was in keeping with the words of Paragraph 2ii which requires that the Project Agreement:

> "...would *result* in a reduction of total wages and benefits... *of an employee*... that is proportionally larger than the largest reduction of that would apply *to an employee* represented [by a different] bargaining agent."

The analysis depends on the *result* to an *employee*, and each employee in the Project Agreement would see a 5% wage reduction. Benefits would remain at 100% of their Provincial Collective Agreement levels. In the SCA's view, this provides for ease of calculation and an easily ascertainable result. It argues that Paragraph 2ii exists to provide a remedy to a trade union that is being treated in a different fashion, for example required to accept a 6% wage reduction rather than a 5% wage reduction. It would also make for more comprehensible proposals and clearer negotiations between the proponents of a project agreement and of the local building trades unions.

13. The SCA argues that the Provincial Agreement amendments were not intended to allow the type of challenge that is made by the IBEW here and that the intent of the legislative amendments were simply to ensure that the non-consenting trades were not treated adversely by those who had agreed to the project agreement. However, the SCA offered no extrinsic aids to interpretation of the statute, and hence we are left with the words of the Act as they appear in Paragraph 2ii.

Analysis

The "wages only" argument

14. The analysis proposed by the SCA fails to take into account one of the three changes it proposes. In *Shell Canada Products*, above, the Board dealt with the question of whether or not

it ought to have regard to the change in some collective agreements from a 36 hour work week to a 40 hour work week. I agree with that decision that it is impossible to ignore the results of that change. The change from 36 to 40 hours is one of the significant features that make up this Project Agreement for some trades. It is impossible to say that that is not a factor that the Board ought to consider in making its calculations.

15. It is overly simplistic to say that the wages payable for every hour of work are reduced by 5%. It depends on which hour one looks at. The hourly wage paid for the hours between 9 and 10 a.m. on Monday morning will indeed be reduced by 5%. If one looks at an employee who is a member of a trade whose provincial collective agreement requires double time for the last four hours on Friday (assuming those are the 37th – 40th hour in that week) and examines 1:00 to 2:00 p.m. on a Friday, the reduction is 52.5%. Both rates are inaccurate reflections of the effect on wages alone of the Project Agreement. Since the change proposed by the SCA in this Project Agreement relates specifically to the number of hours worked in a week, and because it does have different effects on different hours in the week, the one week period is the time period that must be examined.

16. This conclusion is reinforced by the words of Paragraph 2ii. Even if one were to accept the SCA's argument that the sentence ought to be read as "total wages and total benefits", that would still leave us with the phrase "total wages". The word "total" must be given some meaning; it connotes some form of addition. If the Act meant "wage rate" that is a very simple and common phrase that could have been used. It was not. At the very least, on the SCA's argument, the word "total" must mean an addition of the hours for which compensation is altered by the terms of the Project Agreement. In this case, the smallest such unit of time is one week.

17. Even when one looks only at the wages component only of the compensation package, it is apparent that a 5.0% reduction in the wage rate will be applied unevenly among different trades depending on whether the standard work week under a Provincial Collective Agreement is 36 or 40 hours. The wage rate under the IBEW Provincial Collective Agreement is roughly $40.00 per hour. A 40 hour week would produce a total wage payment of $1760 (composed of 36 x $40 and 4 x $80). 40 hours of straight time under the Project Agreement will result in a payment of wages of $1600 (40 x $40). That is a reduction of 9.09%. A trade that has a standard 40 hour week under its Provincial Collective Agreement will have a reduction of only 5.0%. The rates are simply different.

18. In *Shell Canada Products*, above, the Board came to the same conclusion at paragraph 8:

> Thus, as a matter of principle, applying a straight percentage reduction to employees who have the same normal hours of work imposes the same proportional reduction on all those employees, but where that same straight percentage reduction applies to the nominal hourly rate of all employees, but some of those employees have their normal work week increased with premium pay becoming payable only when they work in excess of that lengthened work week, the employees who have had their normal work week increased have had a greater proportional reduction of their total wages and benefits than the reduction of the total wages and benefits for employees who have maintained their normal work week with only a straight percentage reduction in their hourly rate.

I agree with this conclusion.

The "total wages and benefits" argument

19. Even if one leaves aside the issue with respect to the 40 hour week, the SCA's argument is that the Board should exclude consideration of the non-wage portion of the compensation package because there has been no reduction of that portion of the Provincial Collective Agreement. That argument ignores the significant parts of the subsection, specifically the term "the reduction in the *total* wages *and benefits* expressed as a rate…". The SCA's argument would render the word "total" entirely redundant. If one were to look only at the wages paid for any hour of work (ignoring the Friday overtime issue) then the word "total" could be deleted from the Act. The word "total" suggests some form of addition before the "rate" is calculated.

20. The phrase is "total wages and benefits". If the legislature had meant "total wages and total benefits" it could easily have said so. The intricacy of the project agreement amendments to the Act clearly indicates that the legislative draftsperson was quite aware of how a typical construction collective agreement works and specifically how the various provincial collective agreements work. The use of the phrase "total wages and benefits" makes it impossible to treat the two items separately. The word "total…and…" must describe the combination of the two components over some period of time, in this case both wages and benefits.

21. The SCA also argued that this analysis produces a result that makes it impossible for a proponent of a project agreement to negotiate any form of project agreement. This is, for whatever reason, not borne out when looking at the factual history that both parties provided. Since the Board's decision in *Shell Canada Products*, above, the SCA relies on six project agreements, one of which was cancelled, and all of which were approved (save for this challenge by the IBEW). The IBEW relies on statistics contained in a paper delivered by Mr. Harry Freedman, Vice-Chair of this Board, in a continuing education seminar. The paper lists 21 project agreements of which the Board had notice. Three objections were dismissed and, in one case, one wage rate was modified. In the end, 16 projects were declared in force. It is impossible to know whether there might have been more such project agreements under a different regime, but clearly they are not impossible to negotiate as the Act now stands. The reality is that in every case, every project agreement will succeed only when at least 60% of the trades concerned agree that it is in their long-term interests to agree to a reduction in compensation in order to ensure that the project proceeds. That basic agreement must be made before any project agreement will go forward.

Other matters

22. The SCA also argued that the IBEW was improperly benefiting by its objection to the Project Agreement. It also argued that the IBEW was acting in bad faith in doing so. It did not allege or suggest any improper behaviour on behalf of the IBEW. It has not suggested that the IBEW held out hopes that it would agree to the Project Agreement and then reneged on the deal after other trades had locked themselves in by consenting to the amendments. Indeed, once the IBEW had given its notice of disapproval, the SCA was on notice that the IBEW might seek an amendment to the Project Agreement. I fail to understand how there is anything improper about a trade union seeking to obtain a result that is mandated by the Act. Once again, consensus is the real key to any project agreement.

23. The SCA argued, finally, that benefits should be limited to the pension and health and welfare benefits that are paid to an account of each individual employee. I do not accept that argument. Again, common parlance in the construction industry is that the "benefit package" includes essentially all non-wage payments to one fund or another.

24. In the end, it may be less possible to identify a specific personal benefit to an individual employee in, for example, an Organizing Fund. It is evident that all members of a union benefit when the number of unionized contractors increases. The union as a whole has greater bargaining strength, and the individual employee has a greater number of work opportunities. A Training Fund that provides ongoing training will be of immediate benefit only to some members of a local union in any one year. Surely the Act cannot require the parties or the Board to calculate the "personal benefit" to each employee who receives training to ensure that each and every one of them has his or her wages calculated within individual degree of precision. Paragraph 2ii refers to employees, but not in a personal sense. It refers to all employees represented by a trade union and treats all of them in the same way.

25. The parties both agree that the funds paid to an employer association under the Provincial Collective Agreement are not "benefits" to an employee, but rather are a benefit to the employers' agent and therefore may be excluded from the calculation.

26. The SCA also argued that the hours of work (i.e., the change from 36 to 40 hours per week for some trades) should be considered a benefit for the purposes of its argument. Even if it could be, that would not, on this view of what is to be done with "benefits", change the result. In any event, I am not at all clear on how a wage rate that changes after a certain number of hours could be a benefit rather than wages.

The Sprinkler Fitters

27. The pre-hearing submissions revealed one additional variation in the wages paid under the Sprinkler Fitters' Provincial Collective Agreement. Different terms and conditions apply to persons who travel to Sarnia, at the Employer's request, from a city other than Sarnia, to work. The exact number, if any, to whom the "out of town" rates apply, would not be known until the end of the project, or at least until the phase of the work that requires Sprinkler Fitters is complete. The IBEW argues that for this reason the Board ought to ignore the Sprinkler Fitters as a comparator or wait until the end of the job before determining the applicable rate of reduction of the Sprinkler Fitters.

28. Neither suggestion is appropriate. There is nothing in the Act that enables the Board simply to ignore the position of a single trade when one party or the other suggest that it is relevant. To wait until the project is finished before determining the rate to be paid to electricians is utterly unworkable. If the wages were not known until then, no electrical contractor could bid on the job and the project would never be built.

29. In *Shell Canada Products*, above, the Board said at paragraph 9 and 11:

> 9. The concept of "total wages and benefits expressed as a rate" must relate to the monetary elements of the collective agreement such as wages, vacation pay and as the proponent suggests, "the benefit package paid to or on behalf of an employee". That concept also includes, in our view, those

> normal recurring events that have a clear calculable monetary impact on the weekly pay of all employees, such as an employee's normal work week. For purposes of this case, it is not necessary for the Board to attempt to draw the line between what will and what will not be considered in making the determination as to whether certain elements of a proposed project agreement have affected the employees' "total wages and benefits, expressed as a rate".
>
> ...
>
> 11. In our view, the applicant's calculations of the impact of the proposed project agreement on the employees it represents supports our conclusion that the Board should not take into account conditions that are not normal recurring events even when such conditions might well have a monetary component. Conditions that do not normally arise on a weekly or biweekly periodic basis or contingent events that may or may not arise and only have an effect on an individual employee's wages when they do occur are not elements that the Board should consider when assessing the impact of a proposed project agreement on employees' total wages and benefits.

30. I agree. The Project Agreement is negotiated by a proponent who is dealing with a project in a specific geographic location. It deals with the local Building Trades Unions. For that reason the Board should look at what the normal and regular result of the Project Agreement is on an employee in the location where the project is located who receives the normal and regular rates set out under the collective agreement. Travel pay in these circumstances is no more relevant than whether or not some employees work daily overtime on certain phases of the job and thus receive overtime pay above the regular 40-hour week.

Result

31. I conclude then, that the proper manner in which to determine the proportionate reductions in the total wages and benefits of each group of employees represented by a trade is to calculate the total of all hourly payments (other than payments to an employer association fund) that an employer must make under a Provincial Collective Agreement in respect of each hour of work performed by a bargaining unit employee, as compared to the payments an employer is obliged to make for each hour of work of a bargaining unit employee under the Project Agreement, assuming the employee in both cases works a full 40 hour week.

32. IBEW Local 530 is directed to make written submissions as to the appropriate comparator rates and its effect on wages to be paid to members of IBEW Local 530 **on or before August 29, 2011**. The SCA may respond **on or before September 2, 2011** with respect to the calculations and any argument such as its *de minimus* argument that apply to the dollar and cents per hour figure IBEW Local 530 proposes. If there are disagreements, then IBEW Local 530 may respond **on or before September 8, 2011**.

33. I remain seized for that purpose.

2455-10-U Louie Senia, Applicant v. Ontario Public Service Employees Union Local 213, Responding Party v. Kinark Child and Family Services, Intervenor

Discharge – Duty of Fair Representation – Grievance – Timeliness – The applicant complained that his trade union failed to refer his grievance to arbitration in a timely way – Although the applicant had been assured on several occasions by union representatives that the grievance had already been referred to arbitration (and the representatives believed that to be the case), the then union steward failed to ensure that the grievance was internally processed by the union, which failure did not come to light for two years – The Board found that the unexplained failure to make a timely referral of a termination grievance to arbitration constitutes gross negligence or a flagrant error consistent with a non-caring attitude – Balancing the prejudice suffered by the applicant if he is deprived of a hearing on the merits of his grievance against the prejudice suffered by the employer if it is forced to mount a defence to justify the discharge, the Board held that the applicant's prejudice outweighs the employer's – Applicant's termination grievance is to proceed to arbitration and the employer is to waive any right to object to timeliness

BEFORE: *Patrick Kelly*, Vice-Chair.

APPEARANCES: *Louie Senia* appearing for the applicant; *Robin Gordon* appearing for the responding party; *David I. Wakely, Susan Stark* and *Carolyne Hooper* appearing for the intervenor.

DECISION OF THE BOARD: July 8, 2011

1. This is an application alleging a breach of the duty of fair representation as set out in section 74 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act").

Background

2. This complaint arises out of the applicant's grievance challenging his termination from employment with the intervenor at its facility known as Syl Apps Youth Treatment Centre ("the Centre") as a Child & Youth Worker for cause in July 2008. The Centre provides services to youth in trouble with the law and who have mental health issues. It has a secure detention unit. The applicant (or "Mr. Senia") was employed at the Centre as a Child Youth Worker.

3. The reasons for Mr. Senia's termination were set out in a letter dated July 16, 2008 from the intervenor's Associate Director. It reads:

> Since assuming your current position as a regular fulltime Youth Worker on March 28, 2008, you have been the subject of two Children's Aid Society (CAS) investigations for inappropriate interactions with two individual female clients. While the CAS determined not to bring charges against you in either of these instances, Kinark's internal investigation revealed repeated lack of judgment. The latest incident revealed a number of situations, over the course of the evening that put the safety of the client at risk and demonstrated a lack of professional judgment on your part. Furthermore, on June 17, 2008 you failed to provide the required one-to-one supervision of a client which allowed the youth the opportunity to assault another client in

> that targeted client's bedroom. Your repeated failure to follow prescribed treatment plans, Agency policies and procedures and your lack of professional judgment has put clients at risk. For these reasons your employment is hereby terminated effective immediately.
>
> All documentation and monies owed to you will be forwarded under separate cover.

4. Mr. Senia, the responding party ("the union") and the intervenor (or "the employer") had a Step 3 meeting pursuant to the grievance procedure under the collective agreement on or about July 30, 2008, and the employer denied the grievance at that stage. In a letter dated July 30, 2008 denying the grievance, the employer's representative indicated that the decision to terminate Mr. Senia "was made after a thorough review of recent incidents."

5. The employer heard nothing further from the union about the grievance until August 17, 2010 at which time the union notified the employer of a referral of the matter to arbitration. According to the intervenor's pleadings, article 11.01 of the collective agreement between the employer and the union states that a party that intends to refer a grievance to arbitration must notify the other party in writing within ten days of the Step 3 grievance meeting reply.

6. In the intervening period between the July 30, 2008 Step 3 reply by the employer and the referral of the grievance to arbitration in August 2010, the applicant was assured on several occasions by union representatives that the grievance had already been referred to arbitration, and that a date for the hearing would be scheduled in due course. It would appear that those union representatives believed that to be the case. In fact, the then union steward, who is no longer employed by the intervenor, failed to ensure that the grievance was internally processed by the union, and his failure did not come to light until around the time of the referral of the grievance in August 2010.

7. The applicant wants the Board to order the grievance to arbitration, or, in the alternative, order damages and costs against the union and/or the employer. The union contends it did not violate section 74. It says the Board's jurisprudence establishes that the Board does not impose liability under section 74 as a result of honest errors by a trade union. In the alternative, if it did breach section 74, the union says the Board should order the union and the employer to arbitrate the grievance. In the further alternative, if the Board is inclined to award damages, the union says the applicant must prove them, and the Board ought to take into account the likelihood of success of the grievance at arbitration as well as the applicant's mitigation efforts.

8. The employer says it would be prejudiced on account of the lengthy delay by the union in referring the grievance to arbitration.

9. The consultation in this matter took place on June 14, 2011. The parties were given full opportunity to make submissions and provide relevant information to the Board.

Decision

10. Section 74 of the Act reads:

> **74.** A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

11. It is clear to me that the union's failure to refer Mr. Senia's grievance to arbitration until the passage of more than two years from the date of the employer's Step 3 grievance reply constitutes a violation of section 74. The union says it is guilty of no more than an honest mistake. I disagree. The timely referral of a termination grievance is a critical step. The failure of the union steward has not been explained, but more importantly, the union has not explained how it is that the error, if that is what it was, went undetected and uncorrected for more than two years. This would suggest there were no checks and balances in place in the union's internal processes, or that, if there were, they were not engaged. The unexplained failure to make a timely referral of a termination grievance to arbitration constitutes gross negligence or a flagrant error consistent with a non-caring attitude.[1] That is so particularly when one considers what was at stake for Mr. Senia, who had every reason to believe, based on communications from union representatives sincere in their belief, that an arbitration hearing would proceed and that, accordingly, his chance for reinstatement at least remained viable.

12. Accordingly, I find that the union breached its duty of fair representation.

13. The more difficult question is, what to do about it. Normally, referral to arbitration is the primary remedy of this Board in circumstances such as these[2]. The applicant should have the opportunity he would have had if not for the breach of section 74, namely the chance to have his grievance heard *on the merits*. The delay in the referral of the grievance will be relied upon by the employer to argue that the arbitrator is without jurisdiction to deal with the grievance. Normally, the Board's remedy would include an order that the employer must waive any such argument on time limits.

14. The employer contends that it would be prejudiced if the Board were to order the merits of the grievance to arbitration. By the time the arbitration hearing is scheduled, the grievance will be about three years old or more. The delay, says the employer, lies entirely at the feet of the union. Counsel for the employer informed the Board of the names of four witnesses (one manager, and three bargaining unit employees) who are no longer employed by the intervenor and who had relevant evidence concerning the circumstances of Mr. Senia's termination. Counsel also informed the Board that the Centre at which the applicant was employed is under expansive video surveillance. Counsel advised the Board that video footage is often referred to in the determination of grievances. At the time of Mr. Senia's termination, video surveillance footage would have been preserved for a 60-day period. To the extent the assault incident referred to in the termination letter was captured on video, it is no longer available.

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[1] *ITE Industries*, [1980] OLRB Rep. July 1001

[2] See the discussion at paragraphs 5 through 8 in the decision of *William Hill Jr.*, [1995] OLRB Rep. October 1249

Furthermore, counsel urged the Board to consider that the lengthy passage of time will have an effect on the ability of any available witnesses to recall the events surrounding the applicant's termination at an arbitration hearing.

15. I agree that the passage of three years or more since the Step 3 grievance meeting poses some serious problems for the employer going into an arbitration hearing where it has the onus to establish just cause for Mr. Senia's termination. The memories of the employer's witnesses will inevitably have faded to some degree or another. That may, to some extent, compromise the employer's position at arbitration. However, I am not persuaded that the employer has established irreparable prejudice solely attributable to the union's two-year silence concerning the grievance. First of all, the union never withdrew the grievance or indicated expressly that it accepted the intervenor's Step 3 denial of the grievance. The employer inferred that the grievance was dead. The employer did not claim that it had in fact lost or failed to preserve any documentary evidence concerning the applicant's termination (although counsel speculated that that might be the case). As for the surveillance video footage, if there was any pertaining to the circumstances of Mr. Senia's termination, it is the employer's own policy that contributed, at least in part, to its lack of availability. Finally, concerning the ex-employee witnesses, it was not made clear to me why they are necessarily unavailable to testify. The mere fact that they are no longer employed by the intervenor does not mean necessarily that, with some diligence and effort, they might not be located and, if necessary, compelled under subpoena to testify in the arbitration hearing.

16. For these reasons, balancing the prejudice suffered by the applicant if he is deprived of a hearing on the merits of his grievance against the prejudice suffered by the employer if it is forced to mount a defence to justify the termination, I think the applicant's prejudice outweighs the employer's. Without a hearing on the merits, the applicant has no chance to regain his position with the intervenor, and he will be deprived of an opportunity to salvage his reputation in this field of work. The actual extent to which the employer has been prejudiced will not be fully known until after an arbitration hearing on the merits of the grievance. That is a factor the Board may take into account if it becomes necessary to consider an issue of apportionment as referred to in the final paragraph of this decision.

17. In the result, the applicant's termination grievance is to proceed to arbitration forthwith. The employer is directed to waive any right to object to the timeliness of the referral of the grievance to arbitration.

18. The Board remains seized for the purpose of dealing with any issue of apportionment which may arise if the grievance succeeds at arbitration and compensation or damages are ordered by the arbitrator.

0264-10-ES 1022239 Ontario Inc. o/a **Seventy-Five Hundred Taxi Inc.**, Applicant v. Director of Employment Standards, Responding Party v. Jeremy Bond, Mark Brown, Stephan Doyle, Gregg Gapp, Paul Gibson, Don Ingram, Robert McIntomney, Douglas Nethery, William Reid, Douglas Sharrard, Peter Strachan, Timothy Wipp, Robert Horton, Douglas Richard, Gerald Stubbington, John Kendrick, Stephen Walls, Dawson Lisinchuk, Nick Scali, Alice Shymanski, Stephanie Howard, Brad Lacell,

Stewart Szostak, Richard Wipp, Jason Whalen, Gord Scott, Sam Foglia, Darren Patry, Jim Wadas, Shaun McKay, Luke Smith, Patricia Squires, Raymond Saylor, Rimas Gasperas, Ed Lay, Mike Supica, Rob Stancati, Harold Duguay, Jeff Couturier, Kerry Barnum, Ron White, Ian Sharpe, Darcy Bartlett, James Grant, Brandon Printess, Interested Individuals

Employer – Employment Standards – The applicant sought review of an order to pay wages to cab drivers who were found to be employees under the ESA – The facts established that the drivers operate vehicles owned by the applicant by entering into a "lease" agreement (with no set lease fee); answer calls broadcast by a dispatcher; receive T-4 slips at the end of the year; are required to abide by the company's rules; have no authority to set fares or fees – In addition, an Employment Standards Officer had earlier determined that the drivers were employees, and the applicant treated them as such for a time – The Board found that the drivers do not own the most important tools of the business (cab, dispatch equipment, meter, signage); there was very little risk of loss or chance of profit; and the applicant could manipulate terms and conditions of employment – all of which pointed to an employment relationship – Application dismissed

BEFORE: *Brian McLean*, Vice-Chair.

APPEARANCES: *Gregory J. Ducharme, Rick Wright, Kim Campbell* and others for the applicant; *Kikee Malik, Monique Bumbaco, Josephine Darou* and *Harold Bishop* for the responding party Director of Employment Standards; *Jeremy Bond, Gregg Gapp, Gerald Stubbington, Darren Patry, Larry Ferguson, Geraldine Romain, Don Ingram, Rob Stancati, Ray Dawson, Harold Duguay, Douglas Sharrard, Stephan Doyle, Richard Wipp, Karl Rummat* and *Sam Foglia*, appeared on their own behalf, Interested Individuals.

DECISION OF THE BOARD: July 20, 2011

1. This is an application for review by a company of an Order to Pay issued by an Employment Standards Officer under the *Employment Standards Act, 2000*, S.O. 2000, c.41, as amended (the "Act"). The Board held several days of hearing in Sault Ste. Marie to receive the parties' evidence and arguments.

2. The primary issue in the application and the issue which the parties agreed to argue first is whether taxi drivers driving under the banner of the applicant taxi company are employees or independent contractors. There are few facts in dispute. However, the parties called one driver each as a witness which witnesses represented, more or less, the extremes of entrepreneurial activity on the part of drivers. The employer also called as witnesses its owner, Rick Wright and a manager, Kim Campbell. The owner's evidence was not on the whole reliable, but to the employer's credit, was corrected when the manager, Ms. Campbell, testified. Between Ms. Campbell's evidence, the reliable evidence given by Mr. Wright and the evidence given by the two drivers, I have an understanding of the way this business operates.

3. The taxi company is divided into several corporate parts: 1022239 Ontario Inc. which collects lease and other payments through fares earned by drivers and operates a dispatch service through which the drivers are directed to customers; Seventy-Five Hundred Taxi Inc., which owns the taxicabs and then leases those cabs to 1022239 Ontario Inc. which in turn leases the

cabs to drivers; and Poppa's Garage Ltd. which operates a garage where the cars are repaired and maintained. Another company owns the building where the company operates. These related corporations appear to have been set up for tax planning reasons and not for any employment related reasons. They will be collectively referred to as the "company" in this decision.

4. Approximately 50 individuals drive company taxicabs under the banner "7500 Taxi". Some work full time hours, some work part time hours and some are casual. Rick Wright, the company's owner, testified that he creates weekly schedules for leased cars based on sign up sheets. The weekly schedule is posted as a sign up sheet in the drivers' room located at the employer's office and is titled "Lease Reservation". Mr. Wright testified that by signing the weekly sign up sheet the driver is showing interest in leasing a vehicle from the company for that week. The company's obligation is to ensure a car is available on the shift selected. Mr. Bond who testified on his own behalf generally worked 3:30 a.m. to 3:30 p.m. – Monday to Friday. Kenny Barnum, who testified for the company, generally works nights, usually every couple of weeks.

5. Mr. Bond began working for the Company in 2000 after answering an ad for a job in the local newspaper. Following that he obtained a "letter of intent [to hire/engage] from the company", tested for and was granted his City taxicab licence and started work.

6. The company's dispatch service works as one might expect with some unusual features. For dispatching purposes the company has divided the City into geographic zones. At the start of their shift drivers log in (and at the end log out) at the dispatcher's office with their driver number. A slip is generated which shows the meter reading at the start of the shift. The driver then "books mobile" and lets the dispatcher know which zone he/she will start out in. When a driver enters a zone they must notify dispatch and then are placed in the queue for dispatches in that zone. The dispatcher will let the driver know how many taxis are in that zone and where the driver stands on the list. Drivers are not required to take a call when it is offered and may in fact decline dispatches for any number of reasons although this is rarely done. If a driver picks up a flagged fare he/she has to notify dispatch.

7. The taxicab business in Sault Ste. Marie is closely regulated by the municipal government of the City of Sault St. Marie. Among other things the City's taxi by-law establishes the requirements for a driver to get a license to drive a taxicab. One of the requirements set out in Part V 1.1 is that the applicant for a license:

> c) shall provide a letter from his/her employer, or business with whom he has contracted, stating the employer's, or business' name, address and owner's licence number and that the applicant will be employed or contracted by him/her on a full-time or a part-time basis, as the case may be.

In other words, taxi drivers are tied to a particular taxicab company (whether they are employees or contractors).

8. In addition, the by-laws provide for a number of rules which every driver must follow. These include: not driving under the influence of alcohol, not soliciting a person to take his cab by "shouting, or otherwise canvassing members of the general public"; not permitting any person, other than the driver, or employee or person contracted by the owner, to drive his/her vehicle;

keeping the taxi clean; not taking the most direct route to destination; maintaining a neat and clean personal appearance; and return the vehicle to the owner at the end of the work period.

9. The By-law further establishes the taxi tariff and provides that the driver may not exceed that tariff. In other words, taxi drivers generally cannot increase the price of their fares in order to earn more profit. They can, however, decrease fares or waive fares altogether. This is sometimes done as a gesture to assist someone in need or occasionally to increase goodwill with the hopes of obtaining future business. However, the tariffs are so low that it cannot be done too often.

10. After drivers obtain a City licence, with the company's approval they are eligible to "lease" a taxi from the company which owns a number of vehicles licensed by the City as taxicabs. The lease is at the heart of the company's case. The argument the company repeatedly made in final argument is that the "lease is real". It is therefore worth describing the lease in some detail.

11. The concept of leasing a taxi was put into place in the early 2000s. Drivers in place at the time the lease agreement was introduced signed a "vehicle lease/renters/contractors agreement" (the "Agreement") at that time. Every new driver signs the Agreement when they start driving for the company. Drivers sign the Agreement only once and it applies every time they take out a vehicle. It is therefore unlike renting a car from a commercial car rental company like Avis.

12. The Agreement form first provides two options. The first option is that the driver may supply his/her own car and be responsible for all insurance, licensing, decals, maintenance, repairs, etc. There was no suggestion that any driver used this option. The second option is the drivers "may lease/rent a taxicab vehicle from 1022239 Ontario Inc.".

13. Under the Agreement 1022239 Ontario Inc. provides a car in good condition to the driver and it must be returned in good condition. 1022239 Ontario Inc. retains the right to demand the car back at any time. The company attempts to provide to drivers those vehicles which the drivers prefer, including where possible, a specific vehicle.

14. The most unusual aspect of the Agreement is that there is no set lease fee. Instead, the fee is based on receipts from taxicab fares. The driver is entitled to 35%-37% of gross fare receipts and must pay the other 65%-63% to the company. The 35% figure has been adjusted by the company on occasion, most notably when GST rates decreased. On those occasions the lowest amount paid to drivers decreased from 34% and then to 33%. There was also an adjustment when Employment Insurance introduced rules that required that premiums be paid on drivers' behalf.

15. Of the 65% retained by the company, 5% is designated as being for insurance (which is paid for by the company), 20% is reimbursement for fuel (which is also paid for by the company) and the remaining 40% is for "all other fees including but not limited to those described already".

16. Mr. Bond testified that he did not sign an Agreement. However, I find it more likely than not that he signed the Agreement which was put into evidence and which bears his signature.

17. The company employs workers who clean and wash the cabs daily. The driver is reimbursed for gas by taking the money out of the day's fares and then providing a receipt to the company. The company has expressed a preference for which gas station drivers should go to: at one time it was the Canadian Tire so that the company could get the Canadian Tire money. At another preferred station the company had a points card and collected the points from gas purchases.

18. The effect of these various arrangements is that the driver assumes almost no risk (other than his/her time) when he/she "leases" a cab. All fuel costs and routine repairs and maintenance are borne by the company. If the driver earns no money on a shift he/she suffers no loss. The primary risk assumed by the driver is the time spent.

19. There are a couple of exceptions: First, in case of an accident the driver is responsible for paying the company's deductible, or if the repair is less than the deductible, the amount of the repair. The company's insurance deductible was $3500 at the relevant time and $10,000 at the time of the hearing. I heard that at least one driver had quit rather than pay these damages and the company then sued him. I also heard that another driver had paid a $1500 repair bill after he was in an accident while driving a cab. The second exception is if a fare leaves the cab without paying. Drivers are 100% responsible on the rare occurrence that a fare does not pay.

20. If a driver has too many traffic tickets the insurance company might increase the company's premiums. These costs are passed on to the responsible driver.

21. Drivers are provided with a T-4 at the end of the year. Mr. Wright testified that this was because Revenue Canada required the information. I note there was a tax court decision in which the drivers were found to be independent contractors. I also note that Mr. Bond, at least, advised tax authorities that in his opinion he was an employee and paid taxes accordingly. There is no suggestion this was not accepted by Revenue Canada.

22. There are a number of benefits to driving under the taxi company's banner. The primary benefit is that drivers earn the majority of their fares through dispatches from the company's dispatch service, whether to pick-up people or packages. According to Mr. Bond, who was not cross-examined on this point, 98% of his income was earned from dispatched fares. Mr. Barnum testified he received the majority of his revenue from dispatches. However, based on his evidence about the number of non-dispatched fares he receives it is clear he earns the vast majority of his money from dispatched fares.

23. The company supplies child booster seats, radios, meters etc. Drivers may supply their own cell phones, gps units and maps.

24. In addition, there are other programs in place at the company which generate income. The company has a contract with the local school board to take children to and from school. The taxi picks the child up at their house and drops them at the school. The company requests volunteers to do these school runs for the duration of the school year – which are charged at a fixed rate – and the drivers who accept usually pick-up the same children every day. Not all drivers wish to do school runs and drivers are not forced to do them. The company bills the school board which pays the company directly. The meter is not used as it is a negotiated fixed rate.

25. There is a set of written rules for school runs. These include rules like: "No kids in the front seat" and "Don't give gifts to kids" etc. These rules were prepared by Ms. Campbell.

26. The company also has a contract with the City's airport under which it is required to have one to two taxicabs at the airport when flights arrive. Again, these assignments are generally assigned by the company to drivers who wish to do them on a regular basis. The company ensures that a limited number of drivers are assigned to the airport to pick up fares. The company decides the order of which driver is first in line at the airport.

27. In addition, the drivers get access to various corporate accounts. These include accounts for the Worker Safety and Insurance Board, to drive injured workers to and from appointments. These fares are done on the meter if they are in town. Out of town fares are flat rate. The company determines the flat rate.

28. For non-fixed rate accounts and regular dispatched or flagged rides, fares are cash, company account or credit card. If it is a company account the dispatcher tells the driver the account number and the customer signs the chit. At the end of the shift the driver gives the customer signed charge slip to the company. The charge slip is a 7500 Taxi labelled taxi charge slip.

29. Credit card slips are completed by the driver. The driver must call dispatch to ensure the transaction clears and gets it authorized. Corporate charge slips are also completed by the driver.

30. For out of town trips the customer agrees to a flat rate with the company. The dispatcher then tells the driver what the flat fare is. Like other customers, these fares can be refused.

31. At the end of the shift the driver returns the car and cashes out. The driver inputs the end meter reading and any gas they paid for. Then there is reconciliation and the driver retains his 35% take.

32. If a driver is ill and cannot work they generally call dispatch and let them know. They do not have to justify their absence. Mr. Bond testified that if he is going to be absent for his shift he lets dispatch know so they can re-arrange schedules and ensure there are enough drivers. The company's owner told Mr. Bond that he should do this. There is no consequence if he fails to notify. However, he, logically, perceived a general threat that the company would not give him a car if he failed often enough since the company's ability to make money depends on drivers being out on the road.

33. Drivers do not request permission to take time off. They just let the company know they are going to be away. If the driver does not like the cars which are available to take out they may choose not to drive and do so without repercussion. Occasionally a driver may arrive and there is no car available. He/she may just then go home without compensation.

34. Dispatchers have significant control over how much money a driver can make. Drivers are usually friendly to dispatchers and listen to their instructions because they can make or break a day. The company does not allow customers to request a particular driver be

dispatched and drivers can refuse a dispatch without repercussion. Sometimes the dispatcher will ask why the driver is refusing. However, most trips are accepted: if a driver turns down trips he/she is turning down money. Sometimes drivers are asked to come in early for their shift or stay after in order to provide coverage. There is no repercussion if they decline these requests. Drivers are not permitted to have someone else drive their cab.

35. Mr. Barnum testified that he notifies dispatch which zone he is in. He said the reason for that was so that they did not try to send him somewhere else; he "has to work with them". He also advises dispatch that he is going on vacation, gererally a week ahead of time. He says he does this out of courtesy.

36. Both drivers testified there is a knack to sensing which zones are the most likely to yield fares. It might depend on the day of the week, what events are going on in the City, and the time of day. Good drivers might get a sense of what is happening based on the types of dispatches that are being made to them and other drivers. The driver's ability to figure out where the "action" is can lead to greater earnings than a driver who either can't or does not have a desire to work the system.

37. Dispatch does not send a driver to a particular zone. However, they might tell a driver not to pick up a flag if the company is busy with a lot of calls.

38. 7500 Taxi advertises in the yellow pages. Drivers do not advertise and if they did they would have to put the 7500 Taxi phone number in the ad. Receipts provided by drivers to customers are the 7500 Taxi business cards provided by the company. Neither Mr. Bond nor Mr. Barnum has his own business card. There is advertising on the outside of some of the cars which is negotiated by and for the benefit of the company.

39. Drivers do not issue invoices to the company and many do not charge the company GST as a line item. Mr. Bond was given a GST number but never collects it or remits it.

40. If a customer complains about a driver to the company, the company might give a gift to the customer as an apology. The company does not discipline drivers. The company may talk to the driver if it is concerned about his/her behaviour. The company may also call a driver in to get their side of the story in case of a complaint.

41. Mr. Barnum testified that he considers himself to be self employed and not an employee. He files tax returns as a business and deducts his cell phone and laptop computer as business expenses. He collects and remits GST. He works whenever he wishes to work. When he is driving he treats the city like a "chess board". He is aware of what is going on in the City given the time of day and uses strategy in order to be in the right zone at the right time in order to maximize the number of calls and flags he gets. He sometimes will let a passenger drive for free or at a reduced rate. He does this in order to increase repeat business or just to be nice. He has given approximately ten people his cell number so that they can call him directly for drives.

42. If the driver charges less than the amount of the meter the reduction comes out of his share the company gets the percentage of the meter reading.

43. One of the unusual features of this case is that prior to the Orders and Notices of contravention which are the subject of this appeal, the Ministry of Labour had occasion in 2007 to investigate the company. On that prior occasion an employment standards officer made orders under the Act. However, the company did not appeal, decided not to contest the finding that its drivers were employees and adopted the officer's suggestions regarding how to avoid running afoul of minimum wage laws and hours of work restrictions. The company held a meeting with drivers and told them they were going to be treated as employees from then on. The company told them they would be paid minimum wage and vacation pay and would be scheduled. A number of new policies were put in place to increase the company's control over drivers.

44. After the 2007 investigations drivers' terms and conditions were more akin to an employment relationship that they were at the time which was at issue before me. For example, there was a driver sign up sheet for drivers to select which shifts they wished to work. From this the company generated a weekly schedule which was posted in the dispatch room. Following the company's decision to challenge its drivers' status the schedule was no longer created or posted. Similarly, there was an absentee report that some dispatchers would complete. The report recorded the reason for the driver's absence, the duration of the absence and the name of the doctor and hospital if it was due to illness. This practice of requiring reasons for absence also came to an end. Finally there was a "step out sheet" on which was recorded the times at which drivers took breaks and returned to their cars.

45. The company decided to revert back to an independent contractor system prior to the Orders which gave rise to this appeal.

Decision

46. The determination of whether an individual is an employee or independent contractor can be one of the most difficult in employment and labour law. The courts and employment law tribunals have enunciated various tests and identified numerous factors to assist in the determination. These are briefly discussed below. The parties before me each encouraged me to make a decision which finds that either all of the drivers are employees or that all of the drivers are independent contractors. There are two factors which complicate the request. The first is that the drivers do not perform precisely the same work. This is because only some drivers perform school runs and only some drivers occupy the airport post. It is also because some drivers use strategy to generate more fares while others may simply drive around and wait for calls to come in or to be flagged. However, in the end I am satisfied that there is not such a difference between the way different drivers are treated that some are independent contractors and some are employees. In fact, I am satisfied they are all employees.

47. It is important to keep in mind that the concept of employment is varied. The Act defines an employee simply to "include" a person who performs work for an employer for wages and a person who supplies services to an employer for wages. Numerous categories of employees are described in the Act and the Regulations including, perhaps most relevant here, employees who may elect to work or not to work when requested to do so. Therefore, I take little from the fact that the drivers did not have an obligation to work a particular shift. However, I also note that as a practical matter, drivers had agreed to shifts and worked them.

48. It is important that the Board's role is to determine the true nature of the relationship. The fact that the company calls the drivers independent contractors in the Agreement and otherwise, while an important piece of evidence, does not make them so. The Board is well aware that employers may impose a set of parameters on individuals in order to obscure the true nature of their status.

49. The Board's task is to determine whether drivers are in business on their own account or whether they are employees. In my view the entrepreneurial activity of the company's drivers is low even at the extreme end represented by Mr. Barnum. The drivers derive the majority (and probably the vast majority) of their income from company dispatches rather than from their own efforts. Even Mr. Barnum gave his cell phone to only a few people and fares from such people constitute a tiny part of his income.

50. The drivers do not own the most important tools of the business. They do not own the taxicab, the dispatch equipment, the meter or the taxi signage. It is the company that has the licence to operate a taxicab.

51. Further, when a customer steps into a taxicab they could have no idea they are contracting with the driver and not 7500 Taxi. The customer looks for the 7500 Taxi in the Yellow Pages, calls 7500 Taxi, steps into a taxicab with 7500 Taxi signage and is provided with a 7500 Taxi receipt. If there is a complaint the customer calls 7500 Taxi and may be provided with a gift from the company.

52. Some cases have made note of the extent to which the disputed individuals are integral to the company's business. In this case the drivers are fully integral and integrated. They operate under the 7500 Taxi banner and not under their own banner. They are usually not called directly by customers, but depend on the company's dispatch service and (for many) other company business. To put it another way: each driver could not survive as a practical matter on their own they need the company to provide a car, maintain the car, and provide them with business through dispatches and corporate accounts. On the other hand, the company, while claiming to be in taxicab leasing business, is in reality a fully equipped taxi company. It needs the drivers to drive taxicabs in order to get revenue.

53. Almost all of the drivers' revenue is generated through the company's resources and efforts (advertising, corporate accounts, dispatch) and not through the driver's. The drivers do not advertise or otherwise hold themselves out to the public as an independent business; they are part of 7500 Taxi.

54. Risk of loss and ability to make a profit is also a significant factor. In this case there is little risk of loss. The only possible loss is if a fare does not pay the driver or if the driver gets in a car accident. The normal ways that a true independent contractor taxi driver can suffer a loss: gas costs exceed fares, maintenance costs exceed fares are not present here. While the employer placed significant emphasis on Mr. Barnum and other drivers treating the City as a "chess board" to generate more fares, I do not find this activity to be a significant indicator of genuine independent business status. All of the drivers operate within the rules and system established the company. It is the company that divided the City into zones and established how drivers may receive dispatched fares. It requires drivers to notify dispatch of their location and makes them wait in line for a dispatched fare. This is a significant aspect of control since dispatched fares are the drivers' main source of income. On the other hand the ways that a driver

can generate "profit" are the same as for any commissioned sales employee. That is, the driver's personality, hard work and skill at gaming the system can earn him/her more fares but there is no evidence that the amount of extra money earned due to the drivers' talents is significant. Drivers are constrained by the dispatch system in exercising their talents.

55. Finally I also disagree with the employer in its claim that the "lease is real". It is likely that the lease agreement is simply a device designed to obscure the true nature of the relationship. I am unaware of a "real" lease which is signed years in advance, does not pertain to a particular vehicle and which may result (as I heard) in no consideration being paid for use of the car.

56. Furthermore, almost all of the factors in this case point towards a relationship of dependence by the drivers with respect to the company, rather than independence. The company dictates the terms of the relationship and the drivers from how they are dispatched, to the amount of corporate accounts, to the gas stations drivers should try to use. The amount of driver independence is minimal and amounts to "gaming" the system devised and operated by the employer.

57. The way in which the company has varied in its treatment of drivers says much as well. The company has attempted the change the nature of its relationship with the drivers on at least two occasions. First, the drivers were employees, then they were treated as contractors, then when the Ministry first investigated, they were turned back to employees again and a whole set of employee rules was introduced and then finally they were independent contractors again. This manipulation demonstrates the fact that the company has fundamental control over the drivers in addition to day to day control through its dispatch system.

58. The Board has had several occasions to determine whether taxicab drivers are employees or independent contractors in the context of the Act. While each case must be decided on its own facts, the facts in the cases cited are quite similar to those before me. Where the cases differ, as the employer points out, are about the degree to which drivers can refuse to work shifts. However, in my view all that this means is the drivers may well be "elect to work" employees under the Act and is not a "significant factor" in determining whether they are independent contractors or employees.

59. In *Global Courier & Messenger Services Ltd. v. Sandeep Brar*, [2006] O.E.S.A.D. No. 326, the Board described its approach to independent contractor/employee disputes:

> 4. The Board has recently had occasion to consider the distinction between an employee and an independent contractor. In *2006515 Ontario Inc. (c.o.b. Greco Health Shack)*, [2005] O.E.S.A.D. No. 34, the Board made the following observations, which I adopt:
>
> > 34. The Act is deemed to be remedial, as are all statues [sic: statutes], and is to receive "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent and spirit": section 10 *Interpretation Act*, R.S.O. 1990, c. I.11.

35. In *Machtinger v. Hoj Industries Ltd.*, [1992] 1 S.C.R. 986, the Supreme Court of Canada considered the purpose of the predecessor Employment Standards Act, and stated (at page 1003):

> The harm which the Act seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers.
>
> ...
>
> ... Accordingly, an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not.

The current Act has the same purpose and is to be interpreted in a similar manner.

36. "Employee" is a defined term under section 1 of the Act. The definition is inclusive and includes "a person who performs any work for or supplies any services to any employer for wages". What ever else this may mean, an individual who is an "employee" within the meaning of the Act, and hence entitled to protections of the Act, at the very least includes those individuals who would be considered employees at common law.

37. The test to be applied in determining whether an individual is an employee or an independent contractor at common law was recently reviewed by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983. The Court reviewed the various tests which have been articulated at common law over time: the "control test"; the "fourfold test"; and the "organization test" or "integration test". The Court noted the difficulties which have emerged from the application of each of these tests. Of note, with respect to the "organization test", the Court referred favourably to the following statement by MacGuigan J.A. in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553:

> Of course, the organization test of Lord Denning and others produces entirely acceptable results when properly applied, that is, when the question of organization or integration is approached from the persona of the "employee" and not from that of the "employer," because it is always too easy from the superior perspective of the larger enterprise to assume that every contributing cause is so arranged purely for the convenience of the larger entity. We must keep in mind that it was with respect to the business of the employee that Lord Wright [in *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161] addressed the question "Whose business is it?" [Emphasis added [by the Supreme Court of Canada].]

38. The Court concluded (at paragraph 46) that: "there is no conclusive test which can be universally applied to determine

whether a person is an employee or an independent contractor". The Court continued, however, as follows:

> 47. Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations, supra, [Market Investigations Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732]. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> Para. 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

> 39. Finally, it is important to note that whether or not an individual is an employee or an independent contractor is a question of law to be determined after consideration of all of the relevant factors. The intention of the parties is relevant only to the extent that it is reflected in the actual arrangements they have made with each other in structuring their relationship. Put another way, the parties cannot by their "agreement" render the relationship of an employee an independent contractor or vice-versa: see for example, *Greypoint Properties Inc.*, [2000] OLRB Rep. May/June 479 at paragraph 15.

60. Employment Standards referees have also noted that the vulnerability of a particular class of person should inform the Board's decision making. In *Eller v. Ontario Minister of Labour*, 1995 Carswell Ont 1297, E.S.A.C. 322:

> 40. Arguably, the statutory purpose test formulated in *Majestic, supra* is even more inclusive. Referee Burkett held there that the common law tests were not appropriate for interpreting the scope of the Act when the Act was clearly designed to expand upon or enhance the protections of the common law. He concluded, therefore, that the existence of an employment relationship should be assessed by reference to the purpose of the statute, which he characterized as "intended to provide certain benefits to persons who by reason of their economic dependence or lack of 'bargaining power' in the market place, might otherwise have to work on terms below the basic minima established in the Act". (*Majestic, supra*, at p.18). Referee Burkett further observed at p.24-25 that:
>
> The Legislature has decided that it is in the public interest that all persons who perform work or supply services to an employer be

> entitled to minimum standards of employment. The Act implicitly recognizes the inherent inequalities which may exist in a modern industrial society and redresses the inequality between the individual and his employer to the extent that the employer is required by statute to comply with the minimum standards. Whereas the Act is not designed to protect or underwrite the independent businessman (see *Becker* decision, affd., supra) it must be said (and indeed it follows from the *Becker* decision) that it is designed to protect those who are dependent in their employment.

41. I agree with Referee Gray in *Belgoma Transportation Limited o/a Checker Cab*, April 8, 1991 (E.S.C. 2838) when he opines that the conclusion which should be drawn from the language of the statute, the various tests and decisions is that

> while the features of their relationship which distinguish an employee from an independent contractor at common law can and, perhaps, should be considered in determining whether an individual is some person's employee under the Act, the purpose of the Act determines the weight to be given those features and others. Having regard to that purpose, the degree to which the performance of work and services by the individual in question is integrated into and organizationally forms part of the enterprise of the person said to be the employer will be a relevant consideration, as will the degree of economic dependence of the individual on the alleged employer under or as a result of their relationship. (*Belgoma* p. 21)

61. Here it is apparent that taxi drivers are a vulnerable class of workers. Many appear not to earn minimum wage, work long hours (5 12 hour shifts per week for example) and do not get paid vacations or holidays. They are dependent in their employment.

62. The facts before me are similar to the facts before me, in *J. W Ferguson Services Ltd. o/a Bracebridge Taxi v. Philyp Kolyn and Ministry of Labour*, [2005] O.E.S.A.D. No. 362. In that case I found drivers to be employees. While there are factual differences between the circumstances before me now and those before me then, I do not find that they lead to a different result.

63. That leaves the Federal Tax Court decision respecting company drivers. The Court's decision that these drivers are independent contractors for the purposes of Income Tax law must be given respect. While the apparent inconsistent results in this instance are no doubt frustrating for the applicant, the Board must make its determinations based on the evidence before it, which I have done. Furthermore, while determinations made in other statutory contexts may be persuasive, they are not binding on another adjudicative process in another statutory context.

64. In summary, I am satisfied and find that the drivers who operate under the 7500 Taxi banner are employees within the meaning of the Act.

65. I remain seized to determine the remaining aspects of this application should such determination be necessary.

0039-10-R; 0381-10-R; 0451-10-U; 0452-10-U United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. **Trudel & Sons Roofing Ltd.**, Responding Party v. Sheet Metal Workers' International Association, Local 51, Intervenor; Isaac Dyck, Robert Gilbert, Jordan Kuzub, Mark Patterson, James Spence, Dwayne VanEgmond, Jeff Mullin and Stephen Virag, Applicants v. Sheet Metal Workers' International Association, Local 51, Responding Party v. Trudel & Sons Roofing Ltd., United Brotherhood of Carpenters and Joiners of America, Local 27, Intervenors; Isaac Dyck, Francesco Gabriel, Dave Gifford, Robert Gilbert, Damian Greene, John Jawbone, Jordan Kuzub, Cathy Mason, Mel McKinnon, Jeff Mullin, Mark Patterson, Nick Peters, James Spence, Dwayne VanEgmond, Ross Townsend, Stephen Virag and Ken Wallis Applicants v. Sheet Metal Workers' International Association, Local 51, Responding Party v. United Brotherhood of Carpenters and Joiners of America, Local 27, Intervenor; Isaac Dyck, Francesco Gabriel, Dave Gifford, Robert Gilbert, Damian Greene, John Jawbone, Jordan Kuzub, Cathy Mason, Mel McKinnon, Jeff Mullin, Mark Patterson, Nick Peters, James Spence, Dwayne VanEgmond, Ross Townsend, Stephen Virag and Ken Wallis Applicants v. Sheet Metal Workers' International Association, Local 51 and Trudel & Sons Roofing Ltd., Responding Parties v. United Brotherhood of Carpenters and Joiners of America, Local 27, Intervenor

Certification – Construction Industry – Termination – Timeliness – The Sheet Metal Workers objected to a displacement application for certification and an application to terminate bargaining rights, arguing that the Board was bound by a finding of a board of arbitration that no collective agreement was in place at the time the applications were filed – The Board had earlier directed that the collective agreement be settled by arbitration pursuant to s. 43 of the Act – The Board found that once it had made the s. 43 direction, the settlement of the collective agreement, including in this case whether or not a collective agreement existed, rested with the board of arbitration – The board of arbitration determined that there was no collective agreement in place when the representation applications were filed, therefore the applications were untimely

BEFORE: *Marilyn Silverman*, Vice-Chair.

APPEARANCES: *Jesse M. Nyman, Darren Sharpe* and *Don Penteluke* appeared on behalf of United Brotherhood of Carpenters and Joiners of America, Local 27; *Mike Geiger* and *Christopher McClelland* appeared on behalf of Trudel & Sons Roofing Ltd.; *S.B.D Wahl* and *H. Biso Jr.* appeared on behalf of Sheet Metal Workers' International Association, Local 51; *Sheryl L. Johnson* and *Isaac Dyck* appeared on behalf of Isaac Dyck et al.

DECISION OF THE BOARD: July 21, 2011

1. These four applications consist of a displacement application (Board File No. 0039-10-R), a termination application (Board File No. 0381-10-R) and two unfair labour practice complaints (Board Files No. 0451-10-U and 0452-10-U) filed under the provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") that relate to the same corporate responding party, namely Trudel & Sons Roofing Ltd. ("Trudel" or "the employer").

2. This decision deals with a timeliness objection raised by the Sheet Metal Workers' International Association, Local 51 ("Local 51") in the displacement application (Board File No. 0039-10-R) and in the termination application (Board File No. 0381-10-R).

3. The displacement application was filed on April 6, 2010 and the termination application on April 29, 2010. Unless there is reason to distinguish between them I refer to these in this decision as the "representation applications".

4. Local 51 asserts that the Board is bound by a decision of a board of arbitration. The specific finding of that board of arbitration, that Local 51 asserts binds the Board, is the conclusion made that no collective agreement existed at the time the representation applications were filed. If that is the case, the representation applications are untimely.

5. United Brotherhood of Carpenters and Joiners of America, Local 27 ("Local 27") and the group of employees assert that the Board must inquire into whether there was a collective agreement in existence when the representation applications were filed and the Board is not bound by the factual determination of the board of arbitration.

6. This decision deals only with that aspect of Local 51's argument that the Board does not have the jurisdiction to enter into an inquiry as to whether a collective agreement was in existence given the fact that a board of arbitration found that there was no collective agreement in effect.

History of this case

7. On March 5, 2007, Local 51 filed an application for certification, seeking to displace Local 27. The parties agreed to count certain ballots in resolution of outstanding matters between them. The results of that ballot count were that the majority of ballots cast were cast in favour of Local 51, resulting in their obtaining bargaining rights. On April 14, 2009 the Board (differently constituted) certified Local 51 as bargaining agent for certain employees of Trudel performing roofing work in part of the low rise portion of the residential sector of the construction industry. In the April 14, 2009 decision the Board also declared that Local 27 ceased to represent the employees who were the subject of the application.

8. On April 15, 2009, Local 51 served the employer with notice to bargain. A conciliation officer was appointed by the Minister of Labour. A "no-board" report issued June 19, 2009.

9. On November 16, 2009, Local 51 applied to the Board under section 43 of the Act for a direction that the first collective agreement between these parties be settled by arbitration. The Board issued a decision dated December 18, 2009 in which it granted Local 51's request for the direction.

10. A board of arbitration was appointed by the parties to hear and determine the first contract. It issued three awards that are relevant to the instant determination.

11. The first award issued February 9, 2010 (*Trudel & Sons Roofing Ltd.*, 2010 CanLII 4946 (ON L.A.)) dealt with the assertion of the employer that no first contract hearing was

required, largely on the basis that issues between Local 51 and the employer had either been resolved, or were before the Board. The board of arbitration rejected that submission for the detailed reasons given and held that it, and not the Board, had exclusive jurisdiction over the first collective agreement. Local 51 relies heavily on that finding for the purpose of this motion.

12. Having decided that it had exclusive jurisdiction over the first contract determination, the board of arbitration then proceeded to deal with the preliminary issue of whether a first collective agreement was in effect between the parties. Local 51 asserted that there was no collective agreement between the parties and that such an agreement still needed to be determined by the board of arbitration. That led to a further award dated April 19, 2010 (*Trudel & Sons Roofing Ltd.*, 2010 CanLII 35850 (ON L.A.)) (the second arbitration award).

13. For the reasons set out by the board of arbitration in its award dated April 19, 2010, it concluded that the document that the union was prepared to sign as a collective agreement before the commencement of the first contract direction request under section 43 of the Act (in April 2009) was no longer open for acceptance by the employer after the board of arbitration was appointed (January 2010) and that, therefore, no collective agreement had been concluded between the parties.

14. As noted, the representation applications were filed on April 6 and 29, 2010.

15. After hearing the submissions of the parties on what should constitute the first contract, the board of arbitration determined the terms of a first contract between the parties in an award dated June 2, 2010 (unreported) (the third arbitration award).

Submissions

16. Local 51 says that section 43 of the Act provides a complete code governing all aspects of first collective agreement applications. It refers to the interaction between sections 43(8) and 116 of the Act:

> **43.** (8) A board of arbitration appointed under this section shall determine its own procedure but shall give full opportunity to the parties to present their evidence and make their submissions and section 116 applies to the board of arbitration, its decision and proceedings as if it were the Board.
>
> ...
>
> **116.** No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

17. Subsections 43(24) and 25 are also engaged by this determination:

> **43.** (24) An application for a declaration that a trade union no longer represents the employees in the bargaining unit filed with the Board after the Board has given a direction under subsection (2) is of no effect unless it is

> brought after the first collective agreement is settled and unless it is brought in accordance with subsection 63(2).
>
> (25) An application for certification by another trade union as bargaining agent for employees in the bargaining unit filed with the Board after the Board has given a direction under subsection (2) is of no effect unless it is brought after the first collective agreement is settled and unless it is brought in accordance with subsections 7(4), (5) and (6).

18. Local 51 reviews the history of the first contract arbitration provisions of the Act. It asserts that in light of that statutory history, section 43 assigns the jurisdiction to determine the timeliness of termination and displacement applications to the collective agreement arbitrator. It contends that the Board has no discretion once the section 43 direction issues. Further then by operation of the privative clause of section 116 (referred to in subsection 43(8)), the decision of the board of arbitration is cloaked with the full jurisdiction over the collective agreement "as if it were the Board" which includes whether a collective agreement exists. In Local 51's view, the section 116 privative clause, as it is incorporated into section 43(8) protects the decision of the first contract arbitrator from review (see *National Parole Board*, [1996] S.C.J. No. 10). This, Local 51 asserts, is an interpretation of those provisions that is consistent with subsections 43 (24) and (25) of the Act. The result, in Local 51's view, is that the representation applications must be dismissed as untimely in that the Board has no jurisdiction to review the decision made by the board of arbitration on the issue of the existence of a collective agreement.

19. Local 51 then says that the factual and legal determinations made by the board of arbitration in April and June 2010 are binding upon the Board. Local 51's authorities in support of its position deal with the interaction between section 43 and the other sections of the Act.

20. The employer supports the position that the representation applications filed in April 2010 should be dismissed as untimely, although its major stated concern is the disruption and unease these matters have caused in the workplace.

21. Local 27, supported by the group of employees, says that I must determine the factual issue of whether or not a collective agreement was in place when the representation applications were filed in April 2010. Local 27 says that there is nothing in the statute and particularly the sections referred to by Local 51 that says that only the board of arbitration can make that determination. In fact Local 27 references subsection 114(1) of the Act which mandates the Board to determine all questions of fact and law.

> **114.** (1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

22. Local 27 says that timeliness is a factual determination and one that the Board should and must make.

23. Local 27 refers to the decision in *District School Board of Niagara*, 2010 CanLII 64830 (ON L.R.B.). It also provided the Board with a decision that followed *Niagara* in *York Region District School Board*, 2011 CanLII 184 (ON L.R.B.), but did so without comment.

Analysis

24. I am not persuaded by Local 51's s.116 analysis. It addresses the protection of the Board's processes in relation to the courts. It is not translatable to the relationship between the Board and a board of interest arbitration. However, for the reasons that follow, I am persuaded that the Board does not have jurisdiction to determine the issue that was determined by the board of arbitration.

25. It is useful to review the decisions in *Niagara* and *York* and to distinguish them from the instant case.

26. *Niagara* arose as a contest between two unions in respect of newly established school board positions. One union applied for certification of a unit of employees; another proceeded to arbitration asserting that the new positions were covered by its collective agreement. The Board determined that it was not bound by any arbitration award although noted that an arbitrator's determination would not be ignored by the Board once such a decision had issued.

27. In the *York* case, the Board was faced with a similar dispute although in that case the board of arbitration had already rendered its decision regarding whether certain newly created positions fell within the scope clause of an existing collective agreement. Again the Board concluded that it had jurisdiction under the Act to determine the timeliness issue of a certification application.

28. Given the decision and reasoning in *York* and *Niagara*, with which I agree, the issue that must be addressed in this case is whether there is a different consideration where the determination at issue is one made under section 43 of the Act – a section designed to settle a first collective agreement between the parties. For the reasons that follow, I find that such a distinction is warranted and mandated by the statute.

29. In this case, in its decision of December 18, 2009, the Board directed the settlement of a first contract by arbitration. The authority to do so arises out of section 43 of the Act. The Board provided full reasons for that determination. There is no dispute that the Board has the exclusive jurisdiction to make that determination, as it did. But, once that determination was made and the board of arbitration constituted, all matters related to the collective agreement were in the hands of that arbitration board.

30. There is a clear distinction between this case, governed by section 43 of the Act and *York* and *Niagara*, where the dispute centered on whether certain classifications were covered by a collective agreement.

31. In the *Niagara* and *York* cases, the arbitrators were asked to issue declarations that the language of the scope provision of the collective agreements included certain classifications. Those cases did not address representation rights that fall within the exclusive jurisdiction of the Board.

32. In contrast, when the Board makes a declaration under section 43(2) of the Act, it gives to the board of arbitration the determination of the collective agreement and all authority with respect to the finalization of the first contract passes to the board of arbitration. Under section 43 the Board directs interest arbitration. The parties have a choice. Either the interest arbitration is done by private arbitration or, if the parties consent, the Board acts as the interest arbitrator. Notably, whether by private arbitration, or by the Board acting as interest arbitrator, the Board and the private arbitrator exercise precisely the same jurisdiction with respect to settling a first collective agreement. The board of arbitration (whether private or the Board sitting as interest arbitrator) is the body that then decides on all aspects of the terms of the collective agreement over which it has jurisdiction, including what terms have been agreed between the parties themselves (or whether every term has been agreed and a collective agreement concluded) and what terms remain outstanding to be determined by the board of arbitration itself. In this particular case, whether or not a collective agreement existed was one aspect the board of arbitration decided and over which it had jurisdiction. The issue decided by the private board of arbitration was exactly the same as the one which the Board would have been called upon to determine had the Board been acting as the arbitrator. There is no residual jurisdiction in the Board to revisit that determination.

33. In the result, at the time these representation applications were filed, the board of arbitration, constituted under direction by section 43 of the Act, determined that there was no collective agreement in existence between Local 51 and the employer. As a result of that determination, and the operation of subsections 43(24) and (25) of the Act, the representation applications now before the Board are untimely.

34. Counsel to the parties are to consult and advise the Board within 30 days of the date of this decision as to what remains in dispute in these cases. In the event no submissions are received within the time frame provided, all applications will be terminated. In the event submissions are received, I remain seized only to decide how next to proceed.

4118-04-R; 4200-04-U; 4215-04-U UFCW Canada, Applicant v. **Wal-Mart Canada Corp.**, Responding Party; Wal-Mart Canada Corp., Applicant v. UFCW Canada, Responding Party; UFCW Canada, Applicant v. Wal-Mart Canada Corp., Responding Party

Certification – Practice and Procedure – Unfair Labour Practice – UFCW was overwhelmingly defeated in a certification application in March 2005 – The day before the representation vote was held Wal-Mart filed an unfair labour practice complaint primarily concerned with an assault by an employee (who was also a representative of the UFCW) on another employee – The UFCW also filed a ULP on the same day, which did not address the assault, but made various allegations against Wal-Mart – After failed attempts at mediation, then 27 months of neither party contacting the Board, and then further delays, the Board considered Wal-Mart's motion to have this matter dismissed because there was no labour relations purpose to proceed and because of administrative delay – The Board relied on the following factors, among others, to exercise its discretion to dismiss the application on the basis that there was no labour relations purpose to proceed: the Board had already struck between one third and one half of the UFCW's allegations; the ballots

were cast over 6 years ago and the UFCW overwhelmingly lost; the bargaining unit composition had dramatically changed so that two thirds of the current employees were not employed at the time of the incidents; it was not clear that the UFCW could make out a case for the relief it sought; and the cost implications to the parties and the public – Certification application and ULPs dismissed

BEFORE: *Bernard Fishbein*, Chair.

DECISION OF THE BOARD: July 21, 2011

1. It is a frequently referred to truism in labour relations jurisprudence that labour relations delayed is labour relations denied. Unfortunately, these applications are an example of that truism.

What these applications are about

2. OLRB File No. 4118-04-R is a certification application filed by the UFCW Canada ("UFCW") for employees of Wal-Mart Canada Corp. ("Wal-Mart") at its location at 7100 Tecumseh Road East in the City of Windsor ("the Windsor store") on March 1, 2005. At the time of filing the application, the UFCW made no allegations against Wal-Mart. Although there was a dispute between the parties about the exact description of the bargaining unit, and although Wal-Mart's proposed bargaining unit included a larger number of employees than that proposed by the applicant, that discrepancy was not relevant and by decision dated March 4, 2005, the Board directed a representation vote to be held on March 8, 2005. The vote was conducted and a large number of the voting constituency (however defined) voted. Although some votes were segregated, the UFCW was overwhelmingly defeated by such a wide margin that the segregated ballots could not affect the outcome of the vote in any way.

3. OLRB File No. 4200-04-U is an unfair labour practice complaint filed by Wal-Mart against UFCW on March 7, 2005 ("the Wal-Mart ULP"), the day prior to the representation vote in the certification application. The Wal-Mart ULP, although not exclusively, primarily concerns an assault by Dustin Magee ("Magee"), an employee and representative of the UFCW at the time, on an employee of Wal-Mart, Brian Bureau-Dickerson ("Bureau-Dickerson") an opponent of the UFCW organizing campaign. The alleged assault occurred in the parking lot outside the Windsor store during business hours in front of witnesses, including a number of employees in the bargaining unit, on March 3, 2005, two days after the certification application was filed and before the vote was held. Suffice it to say that Wal-Mart, at a minimum, regarded the conduct of the UFCW as outrageous and sought extensive relief, including the dismissal of the certification application.

4. OLRB File No. 4215-04-U is an application under section 96 of the Act filed by the UFCW against Wal-Mart on the very same day, namely, about a week after the original certification application and a day before the vote ("the UFCW ULP"). The UFCW ULP did not deal with the Magee/Bureau-Dickerson incident in any way, but for the first time made many allegations which can be broadly categorized as follows:

(a) allegations arising out of a previous organizing campaign of the United Steelworkers of America ("the Steelworkers") with respect to the predecessor store in Windsor commencing in 1996 and 1997;

(b) allegations concerning Wal-Mart's involvement and the facilitating, if not creating, apparent employee support with respect to the amendments to the *Labour Relations Act* ("the Act"), and in particular Section 11 of the Act in 1998 and 1999 (and, in particular, the removal of the Board's remedial authority to certify a union when it found a violation of section 11);

(c) allegations concerning communications by Wal-Mart to its employees including employees at the Windsor store before the certification application was made (some as early as the summer of 2004) about the UFCW organizing at various Wal-Mart locations in Canada, and, primarily about the successful organizing by the UFCW of another Wal-Mart store in Jonquiere, Quebec, and the announced closing of that store on February 9, 2005, the same day that first contract arbitration was ordered to resolve a collective agreement there, as well as allegations of Wal-Mart's overt and covert support of employees opposed to the UFCW organizing campaign;

(d) allegations of Wal-Mart allowing employees opposed to the UFCW organizing campaign (including Bureau-Dickerson) to "disrupt" a UFCW press conference immediately following the application for certification and to circulate within the store to campaign against the UFCW.

5. The UFCW ULP claimed extensive and arguably extraordinary relief with respect to not just the Windsor store but all Wal-Mart retail operations throughout Ontario. Significantly, the relief claimed also included a second representation vote (under stipulated access, notice and other conditions) in the event that the union was unsuccessful in the representation vote which had not yet been held. Equally of note, although there was a claim for damages at large, there was no claim for relief with respect to any particular employees (for example for reinstatement or lost wages) as there were no allegations (in this application) of any individual employees being discharged or discriminated against.

What this hearing is about

6. This hearing was scheduled to deal with preliminary motions made by Wal-Mart. In particular Wal-Mart seeks the dismissal of the UFCW ULP (and consequently the dismissal of the certification application in accordance with the results of the representation vote) either because:

(a) there is no labour relations purpose for the Board to inquire into these applications at this point in time; or

(b) because of the administrative delay on the part of the Board in proceeding with these applications now, more than six years after they were originally filed. In this regard Wal-Mart specifically does not cast blame or fault on the UFCW for any role in the delay of the processing of these matters. Equally, Wal-Mart explicitly does not make any Charter argument or invoke any sections of the Charter with respect to the delay. Rather, it makes this argument solely as a matter of administrative law.

7. Wal-Mart concedes that if the UFCW application is dismissed for either of these grounds, the Wal-Mart ULP should be dismissed as well.

8. Needless to say, these motions were strongly contested by the UFCW.

History and Background of the Applications

9. In order to fully understand these motions, it is necessary to understand the context and recount (if in an abbreviated form) the long, unfortunately tortured, history of these applications.

10. As both parties noted before the Board, both in their original pleadings and in their oral argument, they are not strangers to each other. There has been a long and acrimonious relationship between them. It has been the subject matter of litigation both before labour boards and elsewhere, in the United States, other provinces in Canada and Ontario. It is no secret that Wal-Mart prefers to operate its stores without a union, regards its employees as better off without a union and has readily and regularly communicated these views to its employees.

11. A significant portion of the UFCW ULP relates to the previous organizing by the Steelworkers at the Windsor store which has been described as the "predecessor" to the store which is subject of the UFCW certification application. That organizing was the subject of previous litigation before the Board, *Wal-Mart Canada Inc.*, [1997] OLRB Rep. Jan/Feb. 141, where the Board certified the Steelworkers pursuant to the then existing section 11 of the Act because the conduct of Wal-Mart was determined not only to violate the Act but to make the true wishes of the employees not likely to be ascertained in a representation vote. In fact, in that decision these "fresh" allegations made by the UFCW in its ULP were not raised. Although a collective agreement was ultimately bargained between the Steelworkers and Wal-Mart, the parties became entangled in "a myriad of overlapping legal proceedings" involving unfair labour practice charges, including allegations that the Steelworkers conducted a fraudulent ratification vote, alleged misconduct with respect to an application to terminate the bargaining rights of the Steelworkers, including allegations relating to Wal-Mart providing improper and unlawful support to various employees to oppose the Steelworkers (see OLRB File Nos. 0144-97-U, 1017-97-U, 1865-97-U, 2336-97-U, 3623-97-U, 3840-97-U, 3841-97-U, 4062-97-M, 4063-97-U, 4161-97-U, 4168-97-M, 4447-97-M, 4785-97-U, 0475-98-R, 0808-98-M, 1138-98-U, 2981-98-R, 0680-99-R, 2399-99-R amongst others). Ultimately, resolution of all issues between the Steelworkers and Wal-Mart was reached on April 19, 2000.

12. The UFCW raised other allegations of Wal-Mart's alleged improper support of some employees so those employees could be seen to apparently support amendments to section 11 of the Act (under which Wal-Mart had originally been certified by the Steelworkers). Ultimately that legislation was passed.

13. In its ULP, the UFCW alleged that its organizing campaign for the Windsor store commenced in August of 2004 when employees contacted the UFCW and approximately 50 completed applications for membership were obtained in September of 2004. Even prior to that, the UFCW complains about communications Wal-Mart was making to its employees throughout Ontario (including this Windsor store) about the UFCW's organizing campaigns elsewhere in Canada and in particular, Saskatchewan. Subsequent communications from Wal-Mart, about which the UFCW also complains, primarily dealt with the organizing campaign in Quebec and in

particular the store in Jonquiere, Quebec where the UFCW had been certified. After the UFCW certification, there was Wal-Mart communication about whether the Jonquiere store continued to be economically viable. Ultimately, Wal-Mart announced on February 9, 2005 the closure of the Jonquiere store, the same day that the Quebec Minister of Labour referred the failure to reach a collective agreement to first contract arbitration.

14. A number of other allegations were made about actions and activities that occurred in February and March of 2005, including support of UFCW opponents, the disruption of a UFCW press conference by two employees the day after the certification application was filed, and one alleged threat of physical violence (in an apparently isolated incident, a manager walked by an employee near the punch clock and allegedly said, "If I hear that word union I am going to bat upside someone's head").

15. However, notwithstanding the allegations dating back to 2004 in its ULP, the UFCW, in its wisdom, chose to file its application for certification on March 1, 2005. Again the UFCW had more than ample support to entitle it to a representation vote notwithstanding any dispute raised by Wal-Mart about the size or parameters of the bargaining unit, and a representation vote was directed and counted. The UFCW has never sought to invoke section 11 of the Act since the filing of its certification application nor since the taking of the representation vote. It was only in the filing of the UFCW ULP, almost a week later, that all of these allegations and the possibility of a second representation vote were raised.

The Certification Application and the Events Surrounding It

16. As noted above, on March 1, 2005 the UFCW filed the certification application. Wal-Mart responded and disputed the description of the bargaining unit and the number of employees in the bargaining unit but the numerical disparity was not relevant and by decision dated March 4, 2005, the Board directed a representation vote to be held on March 8, 2005.

17. On March 3, 2005, an altercation occurred in the parking lot of the Windsor store between Magee, a National Representative of the UFCW, and Bureau-Dickerson, an employee opposed to the UFCW's unionization campaign. Magee was arrested and charged and, not surprisingly, the incident garnered a fair degree of publicity and attention in the Windsor area. On or about March 7th Wal-Mart filed its ULP primarily, but not exclusively, dealing with the alleged Magee assault on Bureau-Dickerson. Also on the same day the UFCW filed its ULP.

18. The vote occurred on the following day March 8, 2005. By decision of the same day the Board dismissed Wal-Mart's request that the ballot box be sealed pending the outcome of the Wal-Mart ULP and directed that the ballots be counted. The number of ballots cast in favour of the union was 59 and the number of ballots cast against the union was 167, with 56 segregated ballots (obviously numerically irrelevant to the outcome of the vote).

19. On March 29 and 30, 2005, Wal-Mart and UFCW filed extensive and lengthy responses to the ULP's filed by the other. Wal-Mart estimated that the hearing of its ULP would take 10 to 15 days. The UFCW estimated that the hearing of its ULP would take 8 to 10 days. This was in addition to the preliminary motions that both parties were making and suggested would take a number of days.

20. For purposes of this hearing, Wal-Mart urged that it was significant that in the UFCW response to Wal-Mart's ULP, the UFCW pleaded:

> 21. UFCW does not condone, promote or encourage violence in the workplace. UFCW has attempted to be vigilant over the years in the protection of its members' rights which include the right to be free from that violence. The UFCW opposes resort to intimidation ..... by anyone doing organizing drives.
>
> ...
>
> 26. Wal-Mart relies upon an isolated act of alleged violence involving one employee and one staff person who was first relieved of his duties and has since resigned.
>
> ...
>
> 31. The UFCW submits that in any event no good and sufficient labour relations purpose would be served by inquiring into this complaint. It is a patent "one off" which should be regarded as an unfortunate incident involving two individuals and left to the criminal courts.

Events following the certification and the processing of these applications

21. With respect to the Magee altercation with Bureau-Dickerson, on May 5, 2006, more than a year after the certification application, Magee was convicted of assault. Notwithstanding suggestions in the UFCW response, no counter charges were ever filed by Magee against Bureau-Dickerson. It also became apparent that Magee had previously been convicted of an assault on September 30, 2003 (approximately a year and a half before the certification application) with respect to another completely unrelated incident arising out of his employment as a National Representative but involving another employer, not Wal-Mart. Although Magee left the employment of the UFCW on March 12, 2005, shortly thereafter (on or about March 20, 2005), Magee began employment with the UFCW Local 1000A, a separate and distinct but affiliated local of the UFCW. Wal-Mart submits that in light of these subsequent or subsequently discovered facts, there were material "misrepresentations" to the Board by the UFCW in its response.

22. Meanwhile, the tortured processing of the certification application and the two ULP's began. By decision dated June 13, 2005, having consulted with the parties, the Board set hearing dates for July 13, 14, August 25, October 31, November 1, 4, 7 9, 17, 21, 25, 28 and 29 and December 12, 16, 19 and 21, 2005 for these applications. In addition, the Board indicated that on the first hearing dates of July 13 and 14, 2005, both parties' preliminary motions would be argued dealing with appropriate scope of the litigation including any motions to strike out various portions of the pleadings, any issues concerning the Board's jurisdiction, the appropriate exercise of the discretion to inquire under section 96 of the Act and any other concerns whether a *prima facie* case had been alleged.

23. The hearing did take place on July 13, 2005. The Board reserved its decision.

24. Meanwhile, the Board commenced a mediation process with the agreement of the parties conducted by the then Chair of the Board, Kevin Whitaker. The Board adjourned a Labour Relations Officer's meeting that had been scheduled for March 30, 2005 on the agreement of the parties so that mediation could commence on April 4, 2005.

25. That mediation commenced. Without getting lost in great detail, there were various mediation meetings with the parties together with Chair Whitaker, with the parties separately with Chair Whitaker and various telephone conversations and e-mails from April until approximately the end of December of 2005. Proposed settlement documents crafted by Chair Whitaker were in fact circulated among the parties. As a result of these mediation sessions, on the agreement of the parties, all of the hearings that were scheduled in 2005 were ultimately adjourned.

26. When the mediation stalled in December 20 of 2005, Chair Whitaker suggested in an e-mail to counsel for Wal-Mart:

> "I am not able to get agreement from the union to my proposal at this point and think that our process should be put on hold at this point to see how things develop in Ste. Hyacinthe."

Ste. Hyacinthe was another one of the stores in Quebec which the UFCW had also organized and where issues were also in dispute. Ironically, the issues at the Ste. Hyacinthe store were ultimately resolved and the store continues to operate today.

27. In terms of the processing of these applications, it is not disputed that "nothing" occurred until an e-mail from counsel for the UFCW to Chair Whitaker on or about March 19, 2008 requesting that he resume the mediation attempts. This was a period of approximately 27 months. When it is said that "nothing" occurred, it means that there is no record of either Wal-Mart or the UFCW contacting the Board in any way either with respect to processing the certification application or either of their ULP's.

28. The mediation attempts then continued in stops and starts. There were meetings and communications from March 19, 2008 until approximately September 2008. There then appears to be a gap until January 13, 2009 when the UFCW officials met with Chair Whitaker again.

29. On January 26, 2009, UFCW counsel wrote to the Board requesting that these applications be set down for a pre-hearing conference.

30. Counsel for Wal-Mart responded to the Board on January 28, 2009 opposing any further pre-hearing conference (on the basis that one had already been held earlier on April 4, 2005), and also indicated, in any event, that Wal-Mart was not available on the dates suggested by UFCW counsel. Wal-Mart did not demand that the applications be set down for hearing or indicate that it would not participate in any other mediation efforts – which it in fact did.

31. Notwithstanding the request of the UFCW, the applications were not scheduled. However, in April 2009 Wal-Mart and the UFCW had various meetings together and separately with Chair Whitaker to again discuss a possible resolution. Nothing further occurred until June and July 2009 when there were again separate meetings with Chair Whitaker and communication from Chair Whitaker suggesting a further meeting.

32. On September 4, 2009, UFCW counsel wrote the Board requesting that the applications be scheduled for hearing "given the efforts designed at trying to resolve this matter have recently reached an impasse". The offices of counsel for Wal-Mart immediately wrote to the Board on September 8, 2009 indicating counsel was "out of the country returning to the office on September 22, 2009 and intends to make submissions in connection with these matters upon his return". In fact, no such submissions were ever made.

33. Again, it appears nothing further occurred until communications between Chair Whitaker and counsel for Wal-Mart in January of 2010 at which time Chair Whitaker advised that the UFCW wished these matters to proceed to a hearing.

34. On February 8, 2010, the Board issued its decision with respect to the preliminary motions that had been argued on July 13, 2005. Significant and substantial portions of both the Wal-Mart ULP and the UFCW ULP were struck. In particular the Board struck all of those portions of the UFCW ULP that dealt with the allegations concerning the Steelworkers' previous application and the alleged involvement of Wal-Mart with respect to lobbying the government for amendments to the *Labour Relations Act* and arranging employees to support those amendments. The decision referred the litigation to the Board's Registrar to schedule a hearing to deal with any remaining preliminary or procedural issues.

35. Ultimately, on the agreement of the parties, the Board scheduled a hearing date for May 17, 2010 to address various outstanding procedural issues.

36. On May 16, 2010 the Board notified the parties that the hearing scheduled for May 17, 2010 was adjourned. Chair Whitaker had been appointed a judge of the Superior Court of Justice.

37. Again there was no further activity until on or about January 10, 2011 when UFCW counsel wrote to the Board requesting the matter be scheduled for a case conference and proposing dates available to the UFCW (suggesting that possible dates had been reviewed with counsel for Wal-Mart but not asserting any agreement with respect to those dates). Notwithstanding objections from counsel for Wal-Mart, a pre-hearing conference was scheduled for March 1, 2011.

38. At the case conference, a timetable for proceeding to a hearing was agreed upon and set forth in a decision dated March 1, 2011. A hearing was scheduled for April 29, 2011.

39. When the parties failed to comply with the timetable set forth in the decision, they agreed to adjourn the April 29, 2011 hearing. With the intervention of the Board, a hearing was rescheduled for June 17, 2011 when Wal-Mart's preliminary motions were to be argued.

Other Developments in the Interim

40. The other significant development during the course of this was the litigation in Quebec about the closing of the Jonquiere store, which closing the UFCW argued in its ULP was intimidatory and a violation of the Act in Ontario and which had a chilling effect on the UFCW organizing at the Windsor store, entitling the UFCW to the relief sought (and in particular a second vote).

41. Ultimately, two decisions were issued by the Supreme Court of Canada: *Plourde v. Wal-Mart Canada Corporation* 2009 SCC 54, [2009] 3 SCR 465 and *Desbiens v. Wal-Mart Canada Corporation* 2009 SCC 55, [2009] 3 SCR 540. These cases arose out of complaints by the employees and affiliated UFCW Local in Quebec on behalf of employees about the closing of the Wal-Mart store in Jonquiere.

42. In *Plourde*, the union was unsuccessful before the Commission des relations du travail ("CRT"). Appeals to the Superior Court and to the Quebec Court of Appeal by the union were also unsuccessful. The Supreme Court of Canada also rejected the union's appeal. The majority of the Supreme Court of Canada in *Plourde* made it clear the narrow question being decided was the extent the presumption in section 17 of the *Quebec Labour Code* ("the Code"), that employees lost their jobs because they exercised collective bargaining rights, applied to employees of a closed business (in other words, whether the presumption applied to complaints under certain provisions of the Code but not other provisions of the Code). The majority of the Court explicitly observed:

> "However in a federal state there is no requirement that provincial regulatory schemes must align themselves. It is apparent that some of the differences in the jurisprudence from province to province are a function of the setting in which they are made. Labour relations practices in some of the other provinces should not dictate the outcome in Quebec, which in relation to the section 17 presumption has been based for many years on a principle recently endorsed in *Place des Artes* ".

The bottom line of the *Plourde* decision was that the union's attack on the closing of the Jonquiere store failed.

43. Equally in the companion *Desbiens* case, the majority of the Court declined to refer the complaint back to the CRT:

> "... in the companion case *Plourde v. Wal-Mart Canada Corp.*, 2009 SCC 54, [2009] SCR 465, which dealt with the same factual issue, the CRT heard additional evidence which persuaded it that Wal-Mart had in fact terminated the lease of the building at the Jonquiere location and concluded that Wal-Mart had successfully rebutted the section 17 presumption by proof of a real and definitive business closure. None of the parties now contends that Wal-Mart retains its option to reopen the Jonquiere store. As a practical matter, it would be a waste of the parties' time and money to remit this case to the CRT to be dealt with on the basis of *Plourde* decision. The outcome would not be in doubt. The Jonquiere store is closed and there is no possibility of reinstatement of the employees. The substratum of their section 15 claim no longer exists."

44. At the hearing, counsel for Wal-Mart pointed to these Supreme Court of Canada decisions as confirming that Wal-Mart had not been found to violate the Quebec legislation by closing the Jonquiere store for anti-union animus. At the hearing, counsel for the UFCW was unwilling to concede that point although it appeared to be the case from the decisions of the Supreme of Court of Canada which Wal-Mart relied on.

45. After the hearing was concluded, counsel for the UFCW wrote to the Board, providing a letter from counsel for the affected UFCW Local in Quebec which purportedly "provides an overview of prior decisions relevant to this matter" as well as two other Quebec decisions. Counsel for Wal-Mart immediately replied to the Board indicating the decisions were of no assistance to the Board and objecting to the admission of any letter from counsel for the UFCW in Quebec.

46. Leaving aside the objection of Wal-Mart to the admissibility of the letter from UFCW counsel in Quebec, it is of no assistance to the Board. Counsel for Wal-Mart objected that this was not proper "expert evidence" but it is not clear that counsel for the UFCW was even asserting that. It is certainly not evidence, expert or otherwise. In any event, it has no impact on the Board's decision in this matter. Quite simply, there are two Supreme Court decisions arising out of the Jonquiere closing and they speak for themselves without the necessity of assistance from counsel for the UFCW Local in Quebec.

47. In terms of the two other Quebec decisions provided by counsel for the UFCW, the first is a decision of the CRT dated February 24, 2005 involving a number of employees and Wal-Mart. See *Fleurant et al UFCW Local 503 v. Wal-Mart Canada*, 2005 QCCRT 0095. Leaving aside that it deals with conduct that the CRT finds to violate the Code (but does not involve discharge or any serious discipline), it relates to another store altogether, namely, Ste. Foy (and not Jonquiere) where, ironically, the UFCW was also certified and did conclude a collective agreement which is still in effect. The allegations in the UFCW ULP deal with the publicity surrounding the closing of the Jonquiere store which the UFCW alleges had a chilling effect on its organizing at the Windsor store. Whatever the incidents at the Ste. Foy store, there is no allegation by the UFCW in its ULP about them. Nor in all likelihood could there be such an allegation as the incident did not receive any significant attention in Ontario, nor was either the violation or the relief granted by the CRT particularly notorious. As a result, the CRT decision about Ste. Foy is equally of no assistance to the Board in these proceedings.

48. The second Quebec decision does deal with the Jonquiere closing. An arbitrator found a violation of section 59 of the Code (which appears to parallel the statutory freeze provision in section 86 of the Act). See *UFCW Local 503 v. Wal-Mart Company of Canada* decision dated September 18, 2009, J. G. Menard. The arbitrator found that the laying off of the employees of the Jonquiere store due to its closure was a violation of the Quebec statutory freeze provision. Leaving aside, as Wal-Mart points out, that the decision is under appeal with a hearing scheduled for the Quebec Court of Appeal imminently, it is not clear that the Quebec jurisprudence with respect to the statutory freeze is the same as the Ontario and this Board's jurisprudence. See, for example, where the Quebec arbitrator states:

> "22. It is now accepted as regards both jurisprudence and doctrine that a layoff or dismissal can give rise to a change in the conditions of employment.
>
> ...
>
> 26 ... While it retained the authority to manage the operations of its store, it was hence required to justify decisions such as layoffs, which notably constitute changes to the condition of employment of employees. This being said, the Employer did retain the power to

> decree a shutdown of its activities, as their maintenance is in no way protected under section 59 of the Labour Code."

In any event, more significantly, the allegations in the UFCW ULP are that the closing of the store *per se* in Jonquiere, after a successful unionizing attempt, and on the very day that the Quebec Minister of Labour directed first contract arbitration of the dispute, was so intimidatory and created such a chilling effect in the Windsor organizing and representation vote as to violate the Ontario Act. It is not an allegation that relates to a violation of the freeze provision (regardless of whether a similar conclusion would be found under the jurisprudence of this Board). Accordingly, that decision is also of no assistance to the Board and has played no part in the determination of these proceedings.

49. The last development that must be noted is (and there is no dispute about its truth) that by this point in time approximately two-thirds of the bargaining unit at the Windsor store has changed and is different from the time of the UFCW application in March of 2005. Whether that comparison is made against UFCW's proposed bargaining unit, Wal-Mart's proposed bargaining unit, or the voting constituency ordered by the Board, it is clear that only approximately one-third of the bargaining unit is the same. Leaving aside the UFCW's assertion that the high turnover is common place in the retail industry, the fact remains that approximately two-thirds of the bargaining unit will be affected by relief that the UFCW seeks with respect to incidents completely unconnected to and long before their employment at the Windsor store.

Analysis and Arguments

No labour relations purpose

50. In view of the above, Wal-Mart submits that there is no labour relations purpose for the Board to inquire into these applications at this point in time, and in particular, the UFCW ULP. If the UFCW ULP is dismissed, there is nothing else calling into question the results of the representation vote and it must also accordingly be dismissed. Wal-Mart concedes that should this argument prevail, it also applies to Wal-Mart's ULP which should also be dismissed.

51. The Board's jurisprudence with respect to its discretion under section 96 of the Act is well-established. The Board possesses discretion whether it will inquire or not inquire into an unfair labour practice complaint, and, in particular, because proceeding further serves no labour relations purpose. That is because:

> "It is important for the Board to expend [its] limited resources in a way that is consistent with the objectives of the statute, will best accomplish its statutory mandate, and is sensitive to practical labour relations realities".

See the frequently cited *SEIU Local 204*, unreported decision dated January 16, 1995, OLRB File No. 3431-94-U.

52. That discretion may be exercised at any point in the Board's proceedings. The factors that the Board will look at in determining whether to exercise its discretion not to inquire into a complaint are set forth in many cases and include:

(a) delay in filing the complaint;

(b) whether the case makes out an arguable case for breach of the Act;

(c) the likelihood of success;

(d) the nature and utility of any remedy that might flow;

(e) the cost implications for the parties and the public;

(f) whether some statutory or labour relations purpose is to be served by the litigation exercise.

As the Board has repeatedly observed, the question of whether there is a labour relations purpose in proceeding with a section 96 complaint is a separate question from that of whether a *prima facie* case of a violation of the Act has been made out or whether the Board has the jurisdiction to grant the relief sought. The Board cases have simply summarized the issue as:

> "The question of whether there is a labour relations purpose to be served by the litigation exercise has typically been determined by comparison of the labour relations reality that prompted the complaint in the first place, as compared to its reality at the time that the question of exercising the discretion arises. The Board asks itself two questions: Does the situation that prompted the applications still exist; and/or does the relief requested still make sense?"

See *Stock Transportation Ltd.*, 2006 O.L.R.D. No. 2350 at paragraph 13.

53. The parties do not dispute this general jurisprudence. In fact, the parties referred the Board to essentially the same decisions:

Corporation of the City of London, 2008 O.L.R.D. No. 5310, para. 1;

Stock Transportation Ltd., supra;

SEIU Local 204 and CAW, 2000 CanLII 12366 at paras. 19-28;

Fairfield Inn & Suites, 2009 CanLII 33740 at paras. 14-18;

Brant-Haldimand-Norfolk Catholic District School Board, 2001 O.L.R.D. 1159;

Curtis and CEP, [1993] OLRB Rep. December 1260.

54. What the parties do not agree about is the application of these general principles in the Board's jurisprudence to these applications.

What has not influenced the exercise of the Board's discretion

55. Wal-Mart forcefully argued that one of the factors that the Board should consider in the exercise of its discretion is that the UFCW misled the Board about the assault by Magee on Bureau-Dickerson. Wal-Mart argues that by referring to the Magee altercation as a "one-off situation", or that it did not condone violence, the UFCW had deliberately misled the Board when the UFCW must have known of Magee's previous assault conviction only 18 months earlier. When Magee was almost immediately re-employed by UFCW Local 1000A and the UFCW did not disclose this to the Board, Wal-Mart again argues that the UFCW misled the Board in its so-called policy of not condoning, promoting or encouraging violence (or similarly, as disclosed in the transcript of Magee's criminal trial which Wal-Mart filed, in sentencing submissions, when counsel for Magee asserted that the likely result of the conviction was that Magee "will not be allowed back into union activities" when he was employed by UFCW Local 1000A and had been for at least a year). Wal-Mart's argument appears to be that a determining factor that the Board should consider in exercising its discretion under section 96 in determining whether there was a labour relations purpose in still inquiring into the complaint is whether the UFCW has "clean hands" in the processing of its application.

56. The Board rejects this argument. Leaving aside that these arguments are in connection with the UFCW's assertions in its defence to the Wal-Mart ULP (and not the UFCW ULP which Wal-Mart does not wish the Board to inquire into), the determination of whether a labour relations purpose is served by continuing to inquire into these applications is not a blame or guilt allocation exercise (other than the ultimate determination of whether the Act was violated should the application actually proceed). Notably, that is not a factor which was listed in any of the cases either of the parties referred to. If there is a labour relations purpose to the inquiry, it will exist regardless of which party is more or less blameworthy or has the "cleaner" hands in bringing the application (or the manner of bringing the application) to the Board.

57. Secondly, the Board does not agree with Wal-Mart's characterization that these pleadings by UFCW amount in any way to any sort of "material misrepresentation". It is more than possible (if not more than likely) to read and characterize the UFCW pleadings as correct in that the Magee/Bureau-Dickerson altercation was a "one-off" incident in the Wal-Mart organizing campaign. The previous conviction was a year and a half before and with respect to a totally unrelated employer in another matter. The fact that the UFCW asserted that Magee left its employment is in fact also correct, even if he was employed by Local 1000A shortly afterward. There is no dispute that the Local 1000A is a large, separate and distinct legal entity from the UFCW. Moreover, whatever Magee asserted in his sentencing submissions at his trial is not in any way connected to the UFCW or its counsel and Wal-Mart did not even attempt to assert such connection. Lastly, the fact that Magee was employed by another UFCW local despite prior criminal convictions does not mean that the UFCW condones violence.

58. Finally, whatever the merit of these alleged "material misrepresentations" by the UFCW, they are only pleadings made in the UFCW response to the Wal-Mart ULP. It is neither an unusual nor a surprising development before the Board that the evidence the parties subsequently adduce may not establish or meet their pleadings. That is not a factor that the Board can usefully or reliably look to in assessing whether a labour relations purpose in inquiring further into the complaint can be ascertained.

What Does Matter – What has influenced the exercise of the Board's discretion

59. Wal-Mart forcefully argues that the Board should not exercise its discretion to inquire further into these allegations because no labour relations purpose will be served by such inquiry. In the language of the cases, the question is whether the situation that prompted the application no longer exists and the relief requested no longer makes sense. In other words, Wal-Mart asserts that the labour relations reality or the labour relations "landscape" has dramatically and fundamentally changed since these applications were made over 6 years ago. In particular, Wal-Mart points to the following:

(a) In the February 8, 2010 decision, the Board struck somewhere between a third and a half of the allegations in the UFCW complaint so significant portions of the ULP will not be inquired into. This decision has never been reconsidered, reviewed or attacked.

(b) The ballots in the representation vote were cast and counted over six years ago. The UFCW overwhelmingly lost the representation vote.

(c) What were only allegations about an assault by Magee on Bureau-Dickerson six years ago have now been proven correct by Magee's conviction for assault in 2006.

(d) Wal-Mart asserts that the UFCW concedes that the reason that the UFCW lost the representation vote was Magee's assault.

This is an overstatement since Wal-Mart asserts this conclusion based only on paragraph 29 of the UFCW's response:

> "29. UFCW submits that the only reasonable foreseeable effect of such an incident is that it would damage any union organizing drive…"

In any event, it cannot be disputed that Magee has now been convicted of an assault on a visible opponent of the UFCW organizing drive immediately prior to the taking of the representation vote. If not the determinative factor, it cannot be disputed that it played some effect on the combination of factors resulting in the UFCW's defeat in the representation vote.

(e) The closing of the Wal-Mart store in Jonquiere which the UFCW claimed had a chilling effect both on its organizing drive and the representation vote has now been litigated all the way up to the Supreme Court of Canada. In the *Plourde* and *Desbiens* decisions of 2009, the union ultimately lost, and decisions were not referred back to the CRT. There has been no judicial finding in Quebec that the closing of the Jonquiere store in Quebec has been for anti-union animus.

> Even assuming that the Ontario Board has jurisdiction over events that occurred in another province, as the foundation of violations of the Act in Ontario, it is difficult to comprehend how conduct in another province which has not been found by the Courts to violate the other province's labour relations statute and has not been found to have been motivated by anti-union animus can be said to have a chilling effect on employees in Ontario, let alone to be of such magnitude and lasting impact that it entitles the UFCW to a second representation vote more than 6 years later.
>
> (f) The bargaining unit composition has dramatically changed so that now two-thirds of the current employees were not employed at the time of and have no connection to the incidents complained of in the UFCW ULP.

60. In the unique circumstances of this case (which tests the limits of the Board's discretion), the Board ultimately finds these arguments of Wal-Mart's compelling and persuasive. For all of these reasons as well as the reasons set out below (and not for any single reason alone but their cumulative impact in these circumstances), the Board finds there is no labour relations purpose in inquiring further into these applications.

61. Needless to say, the UFCW opposed Wal-Mart's submissions. The UFCW attempted to distinguish all of the Board's previous cases as essentially cases about "mootness" where the underlying dispute was no longer alive or moot and therefore there was no purpose to inquire to a complaint. While some of the cases may be subject to that characterization, not all of them are. More importantly, without getting into too existential a debate, when exactly does "mootness" begin and end? Is a 6-year old representation vote that a union overwhelmingly loses, where a number of the factual disparities that arose at the time of the vote now seem to have reached their legal conclusion (e.g., Magee's conviction for assault, the Supreme Court of Canada decisions in *Plourde* and *Desbiens*), and the bargaining unit has been transformed by two-thirds, not moot simply by virtue of a long outstanding ULP that has not yet been adjudicated? In these circumstances, the Board does not think so.

62. The UFCW argued that not to proceed with its ULP would reward Wal-Mart for its own serious misconduct and the Board jurisprudence has long recognized that a party is not entitled to benefit from its own wrongdoing. Leaving aside that argument assumes both the truth of the UFCW allegations and their characterization as serious, as noted above, the question of whether a labour relations purpose is served by further inquiry is not a question of allocation of blame. The question is whether a labour relations purpose is still served by the inquiry regardless of whose misconduct was originally in question.

63. In addition to all of the foregoing reasons, even when examined against the traditional factors that are listed in the jurisprudence, *supra*, it appears that the case for the Board exercising its discretion to inquire further into these applications is not made out. For example:

> (a) Whether the complaint makes out an arguable case for breach of some section of the Act/the chance of success.

64. Recalling at the outset that the Board's jurisprudence makes clear that the question is not whether there is a *prima facie* case of a breach of the Act or the jurisdiction to grant the remedy sought (in other words, the Board may determine that there is no labour relations purpose to inquire further even where there is a *prima facie* case), it is important to examine what actually remains of the UFCW complaint after the February 8, 2010 decision striking out significant portions of it.

65. Essentially there are allegations about the communications by Wal-Mart to its employees before the certification application was made about the UFCW organizing in Wal-Mart locations. As well there are communications to the employees about Wal-Mart's position with respect to the Jonquiere store and further communications in the Windsor store about the UFCW organizing there. As well there are many and various newspaper reports of the situation.

66. There can be no doubt that Wal-Mart conducted an aggressive campaign amongst its employees against organizing. Wal-Mart in its own literature made no bones about its preference to remain union-free and that its employees would be better off without a union. However, none of the literature contained any explicit threats or promises. Although sometimes heavy handed, most of the communication is not different from what the Board usually sees in propaganda from employers in a hotly contested union organizing campaign. Moreover, the Act in Section 70, one of the sections the UFCW alleges has been violated, explicitly does not deprive:

> "... an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence."

For purposes of these motions, there is no need to determine whether (in the context of the closing of the Jonquiere store or other events) the communication actually crosses the line and constitutes a violation of the Act. It is enough to observe that here the propaganda is at least very close to that line. Moreover, Wal-Mart cannot be held liable merely because of what is written and distributed in newspapers or the general media (particularly when many of the articles merely repeat or quote assertions both by the UFCW representatives that the Jonquiere store was closed for anti-union animus and Wal-Mart representatives that the store was closed for economic reasons). The point of the observation is simply that the likelihood of the UFCW achieving success in even obtaining a second representation vote, let alone other of its more sweeping remedial claims in these circumstances, is far from clear.

67. More importantly, the communication all pre-dates the certification application, some of it by more than a year. As argued by the UFCW repeatedly throughout its oral submissions, both the UFCW and Wal-Mart are sophisticated parties familiar with each other. There was no secret about Wal-Mart's aggressive stance opposed to the union. Still, the UFCW chose to make its certification application when it did. At the time of the filing of the certification application, the UFCW made no allegations. A request for a second representation vote (and only a conditional request at that time) was not made until its ULP was filed almost a week later. Even then the UFCW has never sought a second vote or relief under Section 11 of the Act.

68. Whatever the merits of the allegation originally that the announcement of the store closing in Jonquiere had a chilling effect on the UFCW organizing campaign and the representation vote, that action has now resulted in two Supreme Court of Canada decisions, *Plourde* and *Desbiens,* which have already been referred to elsewhere in this decision. Without

extensively reviewing those decisions again, the bottom line remains that the union challenge to the closing of the Jonquiere store failed. There has been no judicial finding even in Quebec that the store was closed for anti-union animus. In fact, the Supreme Court refused to remit the matter to the CRT in *Desbiens* because it accepted the finding that the closing was "a real and definitive business closure".

69. The remaining surviving allegations in the UFCW ULP relate to the employee opponents of the UFCW (including Bureau-Dickerson) attending a UFCW press conference on the day after the date of the application, and "asking some questions" which presumably the UFCW regarded as disruptive. The other allegations are that opponents of the UFCW were permitted to solicit support against the UFCW on company property and during company time. There is also the only allegation of supposed physical intimidation because of a manager saying to another isolated employee: "If I hear that word union, I'm going to beat a bat upside someone's head". What obviously is not present is any allegation of employees being improperly terminated, deprived of employment or income during the organizing, because of any union involvement. In fact, Jonquiere notwithstanding, there are no allegations of any threats to close the Windsor store (or any other store in Ontario). In fact, Jonquiere notwithstanding, other stores in the provinces where the UFCW has successfully organized have not been closed.

70. Again, the point of reviewing these remaining allegations is not to decide their truth, but to simply observe that it is not clear that the violations even if proven, would result in the remedy or relief that the UFCW seeks. Leaving aside the extraordinary relief that the UFCW sought with respect to all retail locations of Wal-Mart in Ontario, in its ULP the UFCW fundamentally seeks a second representation vote at the Windsor store. The UFCW never made a section 11 request. Although section 11 at the time of the making of the certification application did not allow the Board the power to certify a trade union (as it now again does), it did allow the Board to order a second vote. However, the test for section 11 relief is higher than only contraventions of the Act. The test for section 11 relief requires the contravention of the Act to be of such a magnitude that (in the words of the statute as it existed at the time of the certification application):

> "... a prior representation vote did not likely reflect the true withes of the employees in the bargaining unit about being represented by the trade union."

In other words, not every violation of the Act warrants section 11 relief. The UFCW never made a section 11 application. Rather it asked for the second representation vote only in its ULP. It is not clear that the Board would grant what in essence amounts to section 11 relief in a section 96 application without requiring the trade union to at least meet the same threshold as in section 11 relief.

71. Leaving aside all the other factors about how the labour relations landscape has changed since the making of the application for certification, the simple observation is it is by no means clear that the UFCW can make out a successful argument for the nature of the relief it is seeking, on the basis of the allegations that are remaining.

(b) The Nature and Utility of any Remedy that Might Flow

72. In terms of the utility of such relief, it is not by any means clear that a second vote in a bargaining unit that is now, six years later, different by two-thirds is warranted. Even assuming that the third of the bargaining unit that remains from when the application was originally filed were UFCW supporters (a dubious assumption), that would be insufficient support to entitle the UFCW to a vote even then. Whether the Board should order a representation vote in such a changed bargaining unit based on events six years before (that may only arguably constitute violations of the Act) that are unrelated to two-thirds of the bargaining unit is, at a minimum, questionable.

73. That is not to say the Board is unaware of the high turnover of personnel in many industries and, in particular, in the retail industry. Nor is it to say that the Board will reward parties who prolong litigation to allow turnover to occur in order to then argue that their case for or against certain relief is now buttressed by the fact of such turnover. More often than not, the length of litigation notwithstanding, the Board will fashion relief that deals with the situation and the bargaining unit as it existed at the outset of the litigation (even in non-construction situations). The burden of the length of the litigation and any resulting change in the bargaining unit will not fall on the relief a successful party is otherwise entitled to.

74. However, in the unique circumstances of this case, where the UFCW knowingly (which it does not deny) sought a representation vote in highly contentious and volatile circumstances, then alleges what it characterizes as serious unfair labour practices, it cannot immunize itself from (or ask the Board to ignore) the substantially altered labour relations landscape which, amongst other factors, includes a bargaining unit that is two-thirds different. This is particularly so when the Board is assessing the labour relations purpose (and the nature and utility of any remedy that might flow) of **commencing** litigation, six years later, seeking a second representation vote in that bargaining unit.

(c) The Cost Implications for the Parties and the Public

75. The UFCW argues that this is now a relatively simple and straightforward case and can readily be completed in the three days of hearing that the Board has scheduled in October of 2011. Moreover, the UFCW argues that both Wal-Mart and the UFCW itself are large, sophisticated parties that can well afford the cost of this litigation.

76. The Board is not persuaded. Even if both parties are sufficiently well resourced (an argument that the Board does not customarily hear) and/or willing to finance this litigation (and Wal-Mart at least is obviously not), it is not just private resources but also the public resources of the Board at stake. As noted earlier, among the reasons why the Board inquires whether there is a labour relations purpose to be served in processing an application further is:

> "... it is important for the Board to expend [its] limited resources in a way that is consistent with the objectives of the statute best to accomplish its statutory mandate and is sensitive to labour relations realities."

These applications were filed more than 6 years ago. Significant Board resources have been utilized in attempting to schedule these proceedings, in attempting to mediate, and attempting to prod the parties to resolution. They have all been unsuccessful. Even the scheduling and hearing

of preliminary motions has been a protracted and difficult effort. Notwithstanding the UFCW's assertion that the case could be completed in the three days, the history and track record of the disputes between these parties very strongly suggests otherwise. It is not likely that three days would conclude these applications. Moreover, even if that were correct, three days of hearings for a certification application is not an insignificant or trivial allocation of resources.

77. None of this is to say the Board is engaged in a process of punishing one of the parties when contentious proceedings do not settle, or take a very long time to litigate. However, these proceedings have essentially not even commenced. Parties cannot be blind to the consequences when subsequent events substantially overtake the original events that led to the filing of the complaints. The Board must consider whether engaging in lengthy proceedings about these past events is worth it.

78. Nor is it clear that some statutory or labour relations purpose would be served by the litigation overall. Other than asserting generally that the statutory or labour relations purpose would be harmed by not allowing its application to proceed, the UFCW did not elaborate how or why that is so. In fact, the employees at the Windsor store (at least those in the bargaining unit) have been covered by a statutory freeze to their working terms and conditions for more than six years. Although there may be no evidence that either Wal-Mart or the UFCW asked for any such change and was refused, the fact remains that there has been a statutory freeze for over six years. As well, representational rights of the subject employees have been left up in the air. No other trade union could make any application for certification. In fact, a dismissal of the application at this point in time may raise issues of a bar that could prolong the period of time for which the employees in the Windsor store are unable to avail themselves of any representational opportunities. The Board is not unduly naïve. It does not expect Wal-Mart to change its aggressive opposition to unionization by the UFCW or anyone else. It does not necessarily expect that there are other unions waiting at the door or that there are employees who are seeking out other unions. However, the agony of these ULP's and certification application has gone on long enough.

79. Simply put, it is time for the UFCW organizing campaign at the Windsor location, which arguably was effectively dead over six years ago, to now be legally buried.

80. The Board is also reassured in its conclusion by, and finds helpful, the very recent decision of the Saskatchewan Labour Relations Board in *United Food and Commercial Workers Local 1400 and Walmart Canada Corp. operating as Wal-Mart and Wal-Mart Canada* (LRB File Nos. 096-04, 038-05, 001-09 and 184-10) released on June 23, 2011, after the hearing, but provided by counsel for Wal-Mart. The UFCW was given an opportunity to make submissions on the Saskatchewan decision and did so.

81. The Saskatchewan decision relates, *inter alia*, to the organizing at the Weyburn Saskatchewan store in 2004 and 2005 which was contemporaneous with the UFCW organizing at the Windsor store. When the Jonquiere store closing was announced, the UFCW also filed an unfair labour practice complaint in Saskatchewan in February 2005 also alleging that closing the Jonquiere store had a chilling effect on the organizing campaign at the Weyburn store contrary to the Saskatchewan statute ("the Saskatchewan ULP"). Ultimately, however, the UFCW's certification application for the Weyburn store was successful and the UFCW was certified in December 2008. As a result, the Saskatchewan ULP was not litigated. However, by that time, the Saskatchewan statute had been amended requiring mandatory representation votes in all

certification applications. As a result, there was a series of court challenges whether the new statute applied to (and therefore a vote was required in) the earlier certification application. After the Saskatchewan Court of Queen's Bench initially quashed the certificate (2009 SKQB 247), ultimately, in October 2010, the Saskatchewan Court of Appeal reinstated the UFCW's certificate (2010 SKCA 125). However, bargaining for a collective agreement soon broke down. There were a number of new unfair labour practices filed by the UFCW and an application was filed by an employee to rescind the UFCW's certificate. Among other things, the UFCW requested the Saskatchewan ULP be relisted for hearing.

82. In its June 23, 2011 decision, the Saskatchewan Board dismissed the Saskatchewan ULP. Even assuming that it had jurisdiction to find conduct in Quebec (which appeared to be lawful in Quebec) could be the basis of a violation of the statute in Saskatchewan, it found that events six years before outside of the province both too old and too remote to demonstrate a real and substantial connection between the impugned conduct of Wal-Mart and events occurring in Saskatchewan – for example, there were no allegations that Wal-Mart closed any stores in Saskatchewan. Equally, the Saskatchewan Board was not prepared to hold Wal-Mart liable or find a violation of the Act based on widespread media coverage of the Jonquiere store closure or speculation in the workplace about it, particularly in the face of Wal-Mart's continued operation of the other unionized store in Quebec in Ste. Hyacinthe. The Saskatchewan Board concluded at paragraph 71:

> "71. Having carefully considered the evidence in these proceedings, we find that the events related to the closure of the Jonquiere store are now too old to provide a basis for an alleged violation of the Act. Even if these events were not too old, there was insufficient evidence to sustain the allegation that the Employer's decision to close the Jonquiere store was motivated by an anti-union animus or that the Employer otherwise did so for reasons in violation of the Act. In the Board's opinion, the events that form the basis of the Employer's alleged violation are too temporally and geographically distant and that there was an insufficient nexus between the Employer's actions in Quebec and this province for the Board to exercise its jurisdiction under the Act. For the foregoing reasons, LRB File No. 038-05 must be dismissed."

83. The UFCW argues that we should give the Saskatchewan decision no weight. It argues the Saskatchewan Board should be given no credibility because of the turmoil and court challenges surrounding the change to the Saskatchewan legislation and its Board. That is simply not persuasive. Regardless of the UFCW's view of the Saskatchewan government, its legislative changes, or its administrative changes to the composition of the Saskatchewan Board, that Board remains the lawful interpreter of the Saskatchewan legislation.

84. The UFCW also argues that the Saskatchewan decision is distinguishable on its facts. To the contrary, although not necessarily arising in the identical litigation context, the Board is struck by the remarkable similarity of the circumstances at the Windsor store and in the Saskatchewan decision. At least insofar as the Saskatchewan ULP and the UFCW ULP at the Windsor store, the Board finds the reasoning in the Saskatchewan decision very persuasive.

Conclusion

85. Accordingly, for all of these reasons the Board will exercise its discretion and not inquire into the UFCW ULP because it serves no labour relations purpose any longer and it is dismissed. Therefore, the results of the representation vote in the certification application are now dispositive. The certification application is therefore also dismissed.

86. The Board directs the parties' and the employees' attention to section 10(3) of the Act. Should an application for certification be filed within one year of the date of this decision, the effect, if any, of this decision and section 10(3) of the Act on that subsequent application may be determined if necessary at that time.

87. Wal-Mart is directed to post copies of this decision immediately.

88. As well, and in accordance with the submissions and agreement of Wal-Mart, the Wal-Mart ULP is also hereby dismissed.

89. The previously scheduled hearing dates of October 12, 13, 19 and 20, 2011 are cancelled.

Administrative Delay

90. In light of the decision not to inquire further into these applications because there is no labour relations purpose, it is not necessary to deal extensively with the issue of administrative delay. However, the parties made extensive submissions both in writing and orally about this issue and it seems inappropriate to leave those submissions without at least some remarks from the Board.

91. Wal-Mart argued that these applications had to be dismissed because of the administrative delay of the Board (and not the UFCW). Wal-Mart conceded that it could not point to any actual or concrete prejudice it suffered, but argued it was not required to do so – it could be inferred from the delay.

92. Wal-Mart explicitly did not invoke the *Charter* and there need be no analysis of *Charter* jurisprudence (if applicable at all) here.

93. Without appearing unduly defensive about the Board or the processing of these applications, there can be no dispute that Wal-Mart, throughout the tortured history of these applications, willingly participated in the extensive mediation attempts. The many hearing dates that were set by the Board were all adjourned with the agreement of Wal-Mart (with the exception of the hearing date cancelled because of the appointment of Chair Whitaker to the Bench). At no point in time did Wal-Mart ever request that these matters be scheduled for hearing (including its own ULP which, when filed, Wal-Mart aggressively asserted cried out for immediate justice and adjudication). Wal-Mart never asserted that it no longer wished to participate in any of the Board's mediation attempts. In fact, whenever the processing of these applications lay dormant for some period of time, it was always at the initiation of the UFCW that their processing resumed.

94. Wal-Mart has referred the Board to a number of cases, and in particular the Supreme Court of Canada decision in *Blencoe v. British Columbia (Human Rights Commission)* 2000 S.C.C. 44, [2000] 2 S.C.R. 307. By and large those decisions involve investigatory agencies (in particular the British Columbia Human Rights Commission) that first investigate and then determine whether to proceed, sometimes to adjudication before different parts of the agency. Whatever the requirements of administrative delay and the responsibilities of the administrative agency, even in *Glencoe*, the blistering criticism of the Supreme Court notwithstanding, the proceedings were not terminated or dismissed as Wal-Mart urges here.

95. In any event, the Board is not an investigatory body. It is a quasi-judicial body. It adjudicates those disputes that the parties bring before it. It schedules those disputes and frequently, if not regularly, adjourns hearings at the request of the parties. Mediation is also a regular part of the Board's processing. In these applications there was the extraordinary step of mediation by the Chair of the Board. However, none of this took place without the agreement of the parties, including Wal-Mart. As noted above, at any point in time Wal-Mart could have insisted that mediation was pointless, and that these applications be scheduled for hearing (particularly its own ULP which it initiated). That never happened.

96. There is no need to decide now whether the Board will ever (or can) dismiss proceedings initiated by the parties on the basis of administrative delay. Rather it is enough to observe that the Board will be loath to dismiss proceedings for administrative delay when the party requesting that dismissal has willingly participated in much of the mediation which led to the delay, never requested that the matter be scheduled for hearing, and cannot point to any actual prejudice it has suffered. To the extent the parties wish their applications to be processed expeditiously before the Board, they are not devoid of responsibility. They can request their matters be scheduled for hearing as soon as possible and to the extent that the Board is able, it will do so. Wal-Mart never did.

COURT PROCEEDINGS

1991-10-R (Court File No. 580/10) Roni Excavating Limited and/or 865217 Ontario Inc. o/a Iron Excavating and Grading and/or Niro Bros. Excavating & Grading Inc. and/or Iron Trio Inc. and/or Orin Landscaping Inc. –and- International Union of Operating Engineers, Local 793 and OLRB

Certification – Construction Industry – Judicial Review – Practice and Procedure – Timeliness – The employer applied to judicially review a Board decision certifying the trade union without considering a late-filed response to the original application – The Board had found that the employer failed to acknowledge the tardiness of its response and equally failed to ask the Board to exercise its discretion to accept a late filing – The employer argued at Court that it had never been given the opportunity to explain its position regarding the delivery of the application package to it, and that the certificate had been obtained by fraud – The Court found the Board's reconsideration decision fell within a range of reasonable outcomes given the record before it, and there was no breach of procedural fairness – Application for judicial review dismissed

Board decision not reported.

Superior Court of Justice (Divisional Court), Jennings, Swinton and Durno JJ., July 12, 2011

Swinton J.:

Overview

[1] The applicant Employer, Roni Excavating Limited and/or 865217 Ontario Inc. o/a Iron Excavating and Grading and/or Niro Bros. Excavating & Grading Inc. and/or Iron Trio Inc. and/or Orin Landscaping Inc. has been found to be a single employer under the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A ("the Act"). It seeks judicial review of two decisions of the Ontario Labour Relations Board ("the Board"): the first, on October 1, 2010 certifying the respondent, the International Union of Operating Engineers, Local 793 ("the Union"), to represent certain employees of the applicant and the second, on November 10, 2010, refusing to grant reconsideration of the earlier decision.

[2] For the reasons that follow, I am of the view that the Board's decisions are reasonable, and the application for judicial review should be dismissed.

Factual Background

[3] The Employer is a construction company operating throughout the greater Toronto area, primarily engaged in residential excavation and site development.

[4] On Saturday, September 18, 2010, the Union filed an application with the Board for certification under s. 128.1 of the Act, which is part of the construction industry provisions of the Act. Section 128.1 allows the trade union to elect to have its application for certification based on membership card evidence, rather than on a vote.

[5] On September 21, 2010, the Union provided the Board with a certificate of delivery, indicating that it had hand delivered the application to the Employer on September 20, 2010. In its application, the Union indicated that there were six employees in the proposed bargaining unit on the date of the application, and it submitted union membership cards for those employees.

[6] On September 22, 2010, around 10:20 AM, the Board sent the Employer its Confirmation of Filing Form (Form B-59) by facsimile. Page one of the form stated that the Union had delivered its application to the Employer on September 20, 2010, and this was the "Delivery Date." Enclosed were Notice to Employees of Application for Certification, Construction Industry and a Confirmation of Posting form.

[7] The Notice to Employees had a Date of Delivery on its first page of September 20, 2010. In the form, the Board described its usual practice in a s. 128.1 application. If the Board is satisfied by the membership cards submitted that more than 55% of the employees in the bargaining unit are union members, the Board may certify without a vote. The Board also stated that this type of application is usually considered on the day following the filing of the response.

[8] Pursuant to s. 128.1(3) of the Act and Rule 25.5 of the Board's Rules, an employer must respond to a union's application for certification within two days after receiving notice. On

September 23, 2010, the Employer provided its written response to the application, noting that the Union's application excluded 38 employees from the bargaining unit.

[9] On Monday, September 27, 2010, the Union sent submissions to the Board, copied to the Employer's counsel, arguing that the Employer's responding materials were late and should not be considered.

[10] On October 1, 2010, the Board issued its decision, in which it certified the Union as the bargaining agent for the applicant's employees. The Board declined to consider the Employer's submissions. It held that a party seeking to have the Board exercise its discretion to consider information filed late under s. 128.1(3) must request the Board to do so and give reasons. Given there was no request here, the Board did not consider the response.

[11] On October 8, 2010, the Employer informed the Board that the Union's application had not been delivered on September 20, 2010, but rather on September 21, 2010. As such, its response was timely. Consequently, it would be requesting reconsideration and an opportunity to call evidence in relation to the delivery date.

[12] On October 13, 2010, the Union provided submissions supporting the September 20, 2010 delivery date. This led the Employer to provide two affidavits, on October 15, 2010, supporting its submission that the delivery date was September 20, 2010. One of those affidavits, from the receptionist, indicated that she received the documents on September 21, 2010 and stamped the envelopes with the dates. She did not give them to Connie Niro, the president of two of the companies, on that day because Ms. Niro was away from the office, returning on the 23rd. I note there is no explanation as to why the material was not given to either of the two other individuals named on the envelopes.

[13] On October 29, 2010, the Employer sought reconsideration of the certification decision. In its materials, it stated that the Union's application had been delivered on September 21, 2010, and so the response was timely. In the alternative, it asked the Board to exercise its discretion to relieve against the time limits, because the delay was caused by the Union's improper representation to the Board as to the date of delivery.

[14] On November 10, 2010, the Board declined the request for reconsideration. It found that the Employer had failed to explain why it made no effort to explain its delay until October 8, 2010. The Employer should have been aware of the Union's stated delivery date from the Board's fax of Form B-59 on September 22, 2010. As well, the Union's position was clear in the submissions dated September 27, 2010 that alleged the Employer's response was untimely.

[15] The Board held that reconsideration is not available where the party requesting it cannot show that evidence that could materially affect the Board's determination was not known to the party beforehand. The Employer did not meet this test, particularly in light of the Union's reply submissions on September 27, 2010.

The Standard of Review

[16] The parties are agreed that the standard of review is reasonableness with respect to the interpretation and application of the Act.

Analysis

[17] At the hearing of this application for judicial review, Employer's counsel focused on the reconsideration decision. He conceded that given the material before the Board, it could reasonably come to the decision to certify, as it believed that the Employer's materials were submitted late, and no request for an extension had been made.

[18] The Employer submits that the Board must grant a reconsideration request and hold a hearing where there are allegations of fraud that are both material and determinative of the matter in issue. Therefore, the Board's decision, on reconsideration, was unreasonable. Its failure to consider the fraudulent misrepresentation by the Union and its refusal to grant the Employer a hearing on this issue constituted a breach of the rules of natural justice.

[19] The Employer also argues that the Board was in breach of s. 64(1) of the Act, which allows the Board, at any time, to declare that a trade union no longer represents the employees in the bargaining unit if the Board finds that the union has obtained a certificate by fraud.The Employer relies on two decisions of the Board: *Wallcraft Painting and Decorating Ltd.*, [1989] O.L.R.B. Rep. March 306 (at para. 8) and *Russell H. Stewart Construction Company Limited*, [1990] O.L.R.B. Rep. Jan. 79 (at para. 3).

[20] As well, the Employer relies on s. 110(16) of the Act, which confers the power on the Board to determine its own practice and procedure, but requires the Board to "give full opportunity to the parties to any proceedings to present their evidence and to make their submissions."

[21] The suggestion that the Board was in "breach" of s. 64(1) of the Act is inappropriate. The Board is not in violation of that provision because it refused to hold the requested hearing. At most, a trade union can be found to have committed fraud, with the result that a certificate can be revoked by the Board pursuant to s. 64(1).

[22] Moreover, I note that the submissions made by the Employer to the Board in support of the request for reconsideration do not mention of s. 64(1) of the Act, nor do they use the word "fraud". At most, they allege that the Union misrepresented the delivery date for the application and request an extension of time for their submissions. Misrepresentation can be innocent or negligent, as well as fraudulent. Therefore, there is no merit to the Employer's submission that the Board ignored an allegation of fraud and erred in focusing on timeliness.

[23] In its reconsideration decision, the Board set out the test normally applied, making reference to *Sarnia Jail*, [1997] O.L.R.D. No. 3512 at para. 2:

> ... the Board will generally not reconsider a decision unless an obvious error has been made; or a request for reconsideration raises important policy issues which have not been given adequate attention or consideration; or the party requesting reconsideration proposes to adduce new evidence which it could not, with the exercise of reasonable diligence, have obtained and adduced previously, and which new evidence would, if accepted, have a material impact on the decision in question; or where a party seeks to make representations which it has had no previous opportunity to make.

[24] The Board refused to grant the request for reconsideration because it was not satisfied that the Employer had new evidence which it could not have obtained with reasonable diligence before the initial decision. The Board found as a fact that the Employer had notice of the delivery date issue at the latest on September 27 with the Union's reply submissions (Reasons, para. 21). The Board rejected the Employer's argument that it did not need to respond to those submissions, stating (at para. 27):

> The responding parties' argument that it could ignore in their entirety the applicant's submissions of September 27th squarely addressing the issue of the response's timeliness because they were "unilaterally submitted" is farfetched and unpersuasive. At least reading those submissions would have put the responding parties on notice that the applicant had a different "belief" about the delivery date.

[25] In my view, the Board's decision not to grant the request for reconsideration was reasonable. The Board was not required to hold a hearing just because misrepresentation by the Union was alleged. In *Wallcraft*, above, the Board had cogent evidence before it of possible prohibited conduct by the employer during a certification campaign. In *Stewart*, above, the Board concluded that the allegations raised by an employee "suggest a serious abuse of the Board's process, which may constitute fraud" (at para. 3).

[26] In the present case, the Board inquired into the circumstances and concluded that the applicant should have been aware that timeliness was an issue before the Board issued its initial decision and raised the issue earlier. At the latest, the Employer knew on September 27 that the Union was arguing that the Employer's response was untimely because the application was delivered on September 20, 2010. The Employer provided no plausible explanation to the Board as to why it chose not to address the delivery issue in a timely manner. Therefore, the Employer did not meet the test for reconsideration, as it had not shown that the evidence it sought to adduce was not available earlier. Nor is this a case where the Employer has been denied the opportunity to make representations that it had no previous opportunity to make.

[27] The Board's reconsideration decision falls within a range of reasonable outcomes, given the record before it, and there was no denial of procedural fairness by it. Therefore, it is deserving of deference.

Conclusion

[28] For these reasons, the application for judicial review is dismissed.

[29] The Board does not seek costs, and none are awarded.

[30] The Union shall have costs of the application. While Union counsel submitted a bill of costs at the end of the hearing, the Employer's counsel did not provide a bill of costs, and no submissions were made on quantum.

[31] If the parties cannot agree on the quantum, Employer's counsel shall make brief written submissions on the Union's bill of costs within 15 days of the release of this decision, with the Union responding within 10 days.

CASE LISTINGS JUNE 2011

(not included in this issue)

CASE LISTINGS JULY 2011

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 2011

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1353-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 1652472 Ontario Inc. (Respondent)

Unit: "all construction labourers in the employ of 1652472 Ontario Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of 1652472 Ontario Inc. in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

1678-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. J.D. Strachan Construction Limited (Respondent)

Unit: "all carpenters and carpenters¿ apprentices in the employ of J.D. Strachan Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and foreman all carpenters and carpenters¿ apprentices in the employ of J.D. Strachan Construction Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

2781-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Aragon (Hockley) Development Corporation and Aragon Properties Ltd. (Respondent)

Unit: "all construction labourers in the employ of Aragon (Hockley) Development (Ontario) Corporation and Aragon Properties Ltd. in all sectors of the construction industry in the County of Dufferin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2328-10-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 989771 Ontario Ltd. o/a W.F. Rothdeutsch and Sons (Respondent)

Unit: "all construction labourers in the employ of 989771 Ontario Ltd. o/a W.F. Rothdeutsch and Sons in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of 989771 Ontario Ltd. o/a W.F. Rothdeutsch and Sons in all sectors of the construction industry in within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

4158-10-R: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1185671 Ontario Limited o/a King Interiors (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of 1185671 Ontario Limited o/a King Interiors in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of 1185671 Ontario Limited o/a King Interiors in all sectors of the construction industry in Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0258-11-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Schifer Cutting & Coring Inc. (Respondent)

Unit: "all construction labourers in the employ of Schifer Cutting & Coring Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Schifer Cutting & Coring Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0795-11-R: Sheet Metal Workers' International Association (Applicant) v. Can-AM Coating Services Inc. (Respondent)

Unit: "all roofers and roofers' apprentices in the employ of Can-AM Coating Services Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all roofers and roofers' apprentices in the employ of Can-AM Coating Services Inc. in all sectors of the construction industry in that portion of the District of Cochrane north of the 50th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

0908-11-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Promark-Telecon Inc. (Respondent)

Unit: "all construction labourers in the employ of Promark-Telecon Inc. in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit)

0923-11-R: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Dynasty Painting Contractor Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Dynasty Painting Contractor Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Dynasty Painting Contractor Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; and the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

0994-11-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Promark-Telecon Inc. (Respondent)

Unit: "all construction labourers in the employ of Promark-Telecon Inc. in all sectors of the construction industry in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman." (2 employees in unit)

1070-11-R: International Union of Operating Engineers, Local 793 (Applicant) v. Old Oak Developments Inc. (Respondent)

Unit: "all employees of Old Oak Developments Inc. engaged in the operation of cranes, shovels, bulldozers or similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all employees of Old Oak Developments Inc. engaged in the operation of cranes, shovels, bulldozers or similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1076-11-R: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Can-Dive Construction Ltd. (Respondent)

Unit: "all carpenters and carpenters¿ apprentices in the employ of Can-Dive Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters¿ apprentices in the employ of Can-Dive Construction Ltd. in all sectors of the construction industry in the County of Grey, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1119-11-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Forrest Mechanical Inc. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Forrest Mechanical Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Forest Mechanical Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the City of Hamilton, the City of Burlington and that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (25 employees in unit)

1153-11-R: IBEW Construction Council of Ontario (Applicant) v. Northwind Solutions Corp. (Respondent)

Unit: "all electricians, electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Northwind Solutions Corp. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all electricians, electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Northwind Solutions Corp. in all sectors of the construction industry in the Counties of Essex and Kent and the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1177-11-R: Construction Workers, Local 53 Affiliated with Christian Labour Association of Canada (Applicant) v. Barrett Mechanical Inc. (Respondent)

Unit: "all journeymen and apprentice sheet metal workers in the employ of Barrett Mechanical Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-

working forepersons and persons above the rank of non-working foreperson, office and clerical staff" (7 employees in unit)

1275-11-R: Construction Workers, Local 53 Affiliated with Christian Labour Association of Canada (CLAC) (Applicant) v. Wicks Construction and General Contracting Ltd. (Ontario Corporation Number 2124279) (Respondent)

Unit: "all construction labourers and all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Wicks Construction and General Contracting Ltd. (Ontario Corporation Number 2124279) in all sectors of the construction industry in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1385-11-R: Construction Workers Local 53 affiliated with the Christian Labour Association of Canada (Applicant) v. Velocity Mechanical Inc. (Respondent)

Unit: "all employees of Velocity Mechanical Inc. employed as journeyman and apprentice refrigeration mechanics, and journeyman and apprentice sheet metal workers in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) and the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

1417-11-R: Labourers' International Union of North America, Local 1089 (Applicant) v. St. Clair Mechanical Inc. (Respondent)

Unit: "all construction labourers in the employ of St. Clair Mechanical Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all construction labourers in the employ of St. Clair Mechanical Inc. in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Bargaining Agents Certified Subsequent to Vote

2590-10-R: Public Service Alliance of Canada (Applicant) v. Queen's University at Kingston (Respondent) v. Queen's University Faculty Association (Intervener)

Unit: "all persons employed as Postdoctoral Fellows by Queen's University, in the province of Ontario, save and except the following: (a) persons who secure their own transferable funding from external grant-funding agencies and for whom this is the sole source of funding; (b) supervisors and persons above the rank of supervisor; (c) persons who hold appointments to the Academic Staff of the University as defined by the University's Statement or Adjunct Academic Staff and Academic Assistants, unless such persons come within the bargaining unit independently of this status; (d) persons who held appointments to the General Support Staff of the University; (e) persons employed as research assistants, research associates, research fellows, clinical fellows, clinical scholars, visiting scholars, visiting researchers and visiting faculty; (f) voting members of the Board of Trustees; (g) employees for whom a trade union held bargaining rights on November 9, 2010; (h) persons who exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations within the meaning of s.1(3)(b) of the Ontario Labour Relations Act, 1995; and (i) members of the legal or medical profession employed in their professional capacity." (193 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	96
Number of persons who cast ballots	96
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	102
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	62
Number of ballots marked against applicant	31
Number of ballots segregated and not counted	2

0143-11-R: Laurentian University Faculty Association (Applicant) v. Laurentian University (Respondent)

Unit: "all persons employed by Laurentian University through the Centre for Continuing Education to conduct instruction at off-campus centres located outside the Regional Municipality of Greater Sudbury or through distance education delivery modes, save and except administrators at or above the rank of Director and academic staff at or above the rank of Associate Dean." (74 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	125
Number of persons who cast ballots	45
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	38
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	1

0394-11-R: Ontario Public Service Employees Union (Applicant) v. Arnprior & District Memorial Hospital Corporation (Respondent)

Unit: "all paramedical employees of Arnprior & District Memorial Hospital Corporation in the Town of Arnprior, County of Renfrew, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union hold bargaining rights as of May 3, 2011" (28 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	29
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

0864-11-R: Teamsters Local Union 938 (Applicant) v. L.V. Rose Int. TR. Ltd. o/a RTL – Reliable Transportation Link (Respondent)

Unit: "all owner/operators employed by L.V. Rose Int. Tr. Ltd. o/a RTL – Reliable Transportation Link in the City of Vaughan, save and except supervisors and those above the rank of supervisor, agency drivers, hired cartage and dispatchers" (17 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	18
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

0906-11-R: Canadian Union of Public Employees (Applicant) v. Brock University (Respondent)

Unit: "all instructors employed in ESL Services at Brock University in the Region of Niagara, save and except supervisors and persons above the rank of supervisors and those persons already represented by a trade union" (38 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	38
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	1

0948-11-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada) (Applicant) v. NS Technologies Group Inc., Injection Division (Respondent)

Unit: "all employees of NS Technologies Group Inc., Injection Division in the City of Whitby, Ontario, save and except supervisors, persons above the rank of supervisors, office staff, sales staff, clerical and engineering staff" (125 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	135
Number of persons who cast ballots	131
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	114
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	10
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	78
Number of ballots marked against applicant	36
Number of ballots segregated and not counted	17

0955-11-R: Public Service Alliance of Canada (Applicant) v. Defense Contract Management Agency - Americas (Canada) (Respondent)

Unit: "all employees of Defense Contract Management Agency - Americas (Canada) employed in the City of Ottawa and the City of London save and except the Deputy Commander and persons above the rank of Deputy Commander, employees in bargaining units for which any trade union held bargaining rights as of June 15, 2011 and pending the resolution of the status of these categories, excluding as well the Human Resource Management Analyst/Executive Support and Mission Support Group Chief." (24 employees in unit)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	2

0976-11-R: Ontario Nurses' Association (Applicant) v. Meaford Nursing Home Ltd. (Respondent)

Unit: "all Registered Nurses and nurses with a temporary Certificate of Registration engaged in a nursing capacity at Meaford Nursing Home Ltd. in Meaford, Ontario, save and except the Director of Care, and persons above the rank of Director of Care and persons covered by collective agreements in place as of June 16, 2011." (8 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	2

0977-11-R: International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 357 (Applicant) v. Stratford Shakespearean Festival of Canada and/or, Stratford Shakespearean Festival Endowment Foundation and/or, Stratford Shakespearean Festival Holding Foundation (Respondent)

Unit: "all Audience Development Representatives including Call Centre, On-Site Membership and Box Office employees, employed by the Stratford Shakespearean Festival of Canada in the City of Stratford, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff and coordinators." (54 employees in unit)

Number of names of persons on revised voters' list	58
Number of persons who cast ballots	51

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	47
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	29
Number of ballots marked against applicant	18
Number of ballots segregated and not counted	4

1017-11-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. TNT Food International Inc. (Respondent)

Unit: "all employees of TNT Food International Inc. employed in the City of Brampton, Ontario, save and except supervisors and persons above the rank of supervisor, office, clerical and sales staff" (85 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	67
Number of persons who cast ballots	81
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	62
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	19
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	55
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	19

1026-11-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Waterford Services Inc. (Respondent)

Unit: "all employees of Waterford Services Inc. employed at 33, 55, 77 and 201 City Centre Drive, in Mississauga, Ontario, save and except non-working supervisors and persons above the rank of non-working supervisor, office and clerical staff" (29 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

1030-11-R: Ontario Public Service Employees Union (Applicant) v. The Hôpital Régional de Sudbury Regional Hospital (Respondent)

Unit: "all biomedical engineering technologists and technicians, all dialysis technologists and technicians and all EEG technologists and technicians, employed by the Hôpital Régional de Sudbury Regional Hospital, in the City of Greater

Sudbury, save and except managers, persons above the rank of manager and persons covered by subsisting collective agreements" (19 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

1037-11-R: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Euro-Can Masonry Inc. (Respondent)

Unit: "all journeymen and apprentice bricklayers and all construction labourers in the employ of Euro-Can Masonry Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non- working foreman." (3 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1049-11-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. McDonnell-Ronald Limousine Service Limited, Airline Limousine Services Ltd., David Eluik, Anthony Mavromaras, Tom Koliopoulos, Allan Ellis, Joseph Ricca, Ciro Vitello, Peter Kougioumzis, John Limnids, Mildred Goddard, Kudlip Singh, Sekon Sarbjit, Gosha Brar, Chris Papadopoulos, S Birk, Stanley Cook and Meftha Gheloufre (Respondent)

Unit: "all dependent contractors of McDonnell - Ronald Limousine Service Limited in its limousine service, operating in and out of the City of Toronto and Regional Municipalities of York and Peel, save and except supervisors, persons above the rank of supervisor, inspectors, dispatchers, multi-plate/multi-car owners or lessees, office and clerical employees." (370 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	384
Number of persons who cast ballots	319
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	317
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	165
Number of ballots marked against applicant	151
Number of ballots segregated and not counted	2

1067-11-R: Canadian Union of Public Employees (Applicant) v. The Hope Centre: Community Resources in Advocacy (Respondent)

Unit: "all employees of The Hope Centre: Community Resources in Advocacy in the Region of Niagara save and except supervisors and persons above the rank of supervisors and administrative staff" (28 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

1069-11-R: Service Employees International Union Local 2, Brewery, General and Professional Workers' Union (Applicant) v. Universal Workers Union, Labourers' International Union of North America Local 183 (Respondent) v. Harold St. Croix and John DaSilva (Intervener)

Unit: "all employees of Universal Workers Union, Labourers' International Union of North America, Local 183 in the Province of Ontario, save and except the Business Manager, the Secretary-Treasurer, the Chief Financial Officer/Chief Administrative Officer, all members of the Executive Board, lawyers and all persons for whom another trade union held bargaining rights as of the date of application" (73 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	98
Number of persons who cast ballots	83
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	81
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	51
Number of ballots marked against applicant	31
Number of ballots segregated and not counted	1

1137-11-R: Teamsters Local Union No. 91 (Applicant) v. The Palisades Ottawa Retirement Residence Inc. (Respondent)

Unit: "all employees employed by the Palisades Ottawa Retirement Residence Inc. at 480 Metcalfe Street, Ottawa, save and except supervisors, security guards, one confidential accounting employee and one employee primarily engaged in sales and marketing" (70 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	70
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	36
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1150-11-R: Service Employees International Union Local 2, Brewery, General & Professional Workers' Union (Applicant) v. Labourers' Local 183 Members Training and Rehabilitation Fund (Respondent)

Unit: "all employees of Labourers' Local 183 Members Training and Rehabilitation Fund in the Province of Ontario, save and except members of the board of trustees, contract and temporary employees" (17 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

1167-11-R: Ontario Nurses' Association (Applicant) v. Lanark Heights LTC. Owned by Devonshire Erin Mills (D.E.M.I) a Subsidiary of Sifton Properties Limited (Respondent)

Unit: "all Registered Nurses and Registered Nurses with a Temporary Certification of Registration engaged in a nursing capacity at Lanark Heights LTC located in Kitchener, save and except Director of Care, supervisors and those above the rank of Director of Care/those above the rank of supervisor" (9 employees in unit)*(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1175-11-R: Canadian Union of Public Employees (Applicant) v. Community Living Upper Ottawa Valley (Respondent)

Unit: "all employees employed by Community Living Upper Ottawa Valley in the City of Pembroke, Ontario, save and except managers/supervising senior Community Living Workers and persons above the rank of manager/supervisor, office and clerical staff and students" (90 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	91
Number of persons who cast ballots	55
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	46
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	42
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	8

1207-11-R: Ontario Public Service Employees Union (Applicant) v. Queen's University Faculty Association (Respondent)

Unit: "all employees of Queen's University Faculty Association in the City of Kingston, save and except supervisors and persons above the rank of supervisor" (5 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1227-11-R: Ontario Public Service Employees Union (Applicant) v. Dr. Bob Kemp Centre for Hospice Palliative Care (Respondent)

Unit: "all employees of Dr. Bob Kemp Centre for Hospice Palliative Care in the City of Hamilton, save and except supervisors and persons above the rank of supervisor and office and clerical" (28 employees in unit)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	25
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	2

1231-11-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Compass Group Canada Ltd. (Respondent)

Unit: "all employees of Compass Group Canada Ltd. engaged in retail Food Services at Trillium Health Centre in the City of Toronto and Trillium Health Centre in the City of Mississauga, Ontario save and except Supervisors, persons above the rank of Supervisors, Office and Sales Staff." (20 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1291-11-R: Canadian Union of Public Employees (Applicant) v. St. Stephen's Community House (Respondent)

Unit: "all part-time employees employed by St. Stephen's Community House in the City of Toronto regularly employed for not more than 24 hours per week, save and except supervisors and persons above the rank of supervisor, employees already represented by a trade union, trainees on the job creation grants, casual employees, peer workers, students and contract employees." (49 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	44
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	2

Applications for Certification Dismissed Without Vote

1733-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. ASI Group Ltd. (Respondent)

Applications for Certification Dismissed Subsequent to Vote

4118-04-R: UFCW Canada (Applicant) v. Wal-Mart Canada Corp. (Respondent)

Unit: "all employees of Wal-Mart Canada Corp. at 7100 Tecumseh Road East, in the City of Windsor, save and except temporary staff and contract employees." (230 employees in unit)

Number of names of persons on revised voters' list	309
Number of persons who cast ballots	282
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	226
Number of segregated ballots cast by persons whose names appear on voter's list	51
Number of segregated ballots cast by persons whose names do not appear on voters' list	5
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	59
Number of ballots marked against applicant	167
Number of ballots segregated and not counted	56

3661-10-R: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. AAK Development Group Inc. and, AAK General Construction Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices employed by the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

0334-11-R: Canadian Union of Public Employees (Applicant) v. Turtle Island Recycling Corporation (Respondent)

Unit: "all employees employed by Turtle Island Recycling in the City of Windsor; save and except for supervisors, those above the rank of supervisors, and those currently covered by a collective agreement" (31 employees in unit)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	22
Number of ballots segregated and not counted	0

0479-11-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Ark-Tech Contracting Ltd. c.o.b. as Ark-Tech Electric (Respondent)

Unit: "all journeymen and apprentice network cabling specialists and communication cable installers in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen and apprentice electricians, all journeymen and apprentice linemen, all journeymen and apprentice network cabling specialists and communication cable installers in the employ of the responding party in all other sectors of the construction industry in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, and in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand Norfolk coming within the former County of Haldimand save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	0

0800-11-R: International Association of Machinists and Aerospace Workers (Applicant) v. Total Care Transport Services Inc. (Respondent)

Unit: "all employees of Total Care Transport Services Inc., working in and out of the Regional Municipality of Halton, save and except supervisors and persons above the rank of supervisor." (34 employees in unit)

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	32
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	18
Number of ballots segregated and not counted	1

0982-11-R: Ontario Public Service Employees Union (Applicant) v. King's University College at the University of Western Ontario (Respondent) v. King's University College Staff Association (Intervener)

Unit: "All non-academic employees at King's University College at the University of Western Ontario in the City of London, save and except supervisors, those above the rank of supervisors, those employed in a confidential capacity, and those employed in job classifications or salary grades eligible for membership in the Professional Officer's Association or their subsequent equivalents. For clarity, students enrolled at King's University College at The University of Western Ontario and working under the Ontario Work-Study Program are not employees of the King's University College at the University of Western Ontario, and are excluded from the bargaining unit." (65 employees in unit)

Number of names of persons on revised voters' list	77
Number of persons who cast ballots	72

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	71
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	17
Number of ballots marked in favour of intervener	54
Number of ballots segregated and not counted	1

0991-11-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Fairview Mennonite Homes and Parkwood Mennonite Homes Inc. C.O.B. as Fairview Mennonite Home, Cambridge, Ontario (Respondent) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Intervener)

Unit: "all employees of the responding party in Cambridge, Ontario save and except coordinators, office employees, supervisors and persons above the rank of supervisor." (95 employees in unit)

Number of names of persons on revised voters' list	126
Number of persons who cast ballots	100
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	80
Number of segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	40
Number of ballots marked against applicant	40
Number of ballots segregated and not counted	20

1047-11-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Phazer Electric Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices and communications installers in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices and communications installers in the employ of the responding party in all other sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills, and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)

Number of names of persons on revised voters' list	47
Number of persons who cast ballots	46
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	46
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	30
Number of ballots segregated and not counted	0

1189-11-R: Teamsters Local Union No. 879 (Applicant) v. Meter-Mix Concrete (London, Ontario) Ltd. (Respondent)

Unit: "all drivers employed by the Meter-Mix Concrete (London, Ontario) Ltd. in the City of London, save and except forepersons and those above the rank of foreperson, batcher/dispatcher, mechanic, office, clerical and sales staff, and students employed during the school vacation period" (17 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	0

1249-11-R: Canadian Union of Public Employees (Applicant) v. York Catholic District School Board (Respondent)

Unit: "all Technical Employees employed by the York Catholic District School Board in the Region of York, save and except supervisors and persons above the rank of supervisor and employees already covered by a trade union." (55 employees in unit)

Number of names of persons on revised voters' list	57
Number of persons who cast ballots	52
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	50
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	38
Number of ballots segregated and not counted	1

Applications for Certification Withdrawn

3987-10-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. J.S. Mackay Heating Incorporated c.o.b. as Mackay Advanced Energies (Respondent)

0291-11-R; 0446-11-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Abbey Caulking, Maintenance & Restoration Ltd. (Respondent)

0892-11-R: Association des enseignantes et enseignants franco-ontariens (Applicant) v. Conseil Scolaire Public du Nord-Est de l'Ontario (Respondent) v. Le Syndicat canadien de la Fonction Publique (Intervener)

1082-11-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Boshart Electric Limited (Respondent)

1136-11-R: Canadian Union of Public Employees (Applicant) v. St. Stephen's Community House (Respondent)

1326-11-R: Labourers' International Union of North America, Local 1089 (Applicant) v. Aluma Systems Inc. (Respondent) v. United Brotherhood of Carpenters and Joiners of America Local 1256, Teamsters Local Union No. 879 (Intervener)

1356-11-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Authen-Tech Communications Canada Inc. (Respondent)

1383-11-R: International Union of Operating Engineers, Local 793 (Applicant) v. Associated Paving Company Ltd. (Respondent)

1397-11-R: International Union of Operating Engineers, Local 793 (Applicant) v. Associated Paving & Materials Ltd. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3395-08-R: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 2041 (Applicant) v. Capital Drywall & Painting Inc., Z & Z Construction Limited, H.M. Construction Ltd. (Respondent) *(Granted)*

2702-09-R: Sheet Metal Workers' International Association, Local 269 (Applicant) v. Precision Sheet Metal Inc., 995451 Ontario Inc. c.o.b. as Quality Mechanical and, 1382667 Ontario Limited c.o.b. as G & R Mechanical Insulation (Respondent) *(Granted)*

2210-10-R: Labourers' International Union of North America, Ontario Provincial District Council Labourers' International Union of North America, Local 1081 (Applicant) v. Ekum-Sekum Incorporated o/a Brantco Construction, Cambridge Curbs & Sidewalks Limited (Respondent) *(Withdrawn)*

3748-10-R: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. AAK Development Group Inc. and, AAK General Construction Inc. (Respondent) *(Terminated)*

SALE OF A BUSINESS

3395-08-R: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 2041 (Applicant) v. Capital Drywall & Painting Inc., Z & Z Construction Limited, H.M. Construction Ltd. (Respondent) *(Granted)*

2702-09-R: Sheet Metal Workers' International Association, Local 269 (Applicant) v. Precision Sheet Metal Inc., 995451 Ontario Inc. c.o.b. as Quality Mechanical and, 1382667 Ontario Limited c.o.b. as G & R Mechanical Insulation (Respondent) *(Granted)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3660-09-R: Anibal Manuel Dos Santos, Francisco Furtado & Pietr Wiecko (Applicant) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Respondent) *(Dismissed)*

Unit: "all of its construction employees, including but not limited to employees employed in its landscaping division, in Ontario Labour Relations Board Area Nos. 8, 9, 10, 11, that part of OLRB Area 12 West of the Trent-Severn Waterway and 18 [the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar; the Regional Municipality of Durham; the Towns of Cobourg and Port Hope, and the geographic Townships of Hope, Hamilton, and Alnwick in the County of Northumberland; the County of Peterborough, the County of Victoria and the provisional County of Haliburton; the County of Simcoe and the District Municipality of Muskoka; and that part of the following geographic area that is west of the Trent-Severn Waterway; Prince Edward County, the geographic

Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland]. For the purpose of clarity: store staff, garage staff, office, and clerical staff including dispatchers, non-working foreman and persons above the rank of non-working foreman, temporary shop employees are not included in the bargaining unit." (3 employees in unit)

3661-09-R: Francisco Furtado and Pietr Wiecko (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) *(Dismissed)*

Unit: "all employees of D.D.R. for whom the union has bargaining rights within the Province of Ontario engaged in work covered by schedules and classifications set out in the agreement, and any additional classifications as may be agreed to by the parties [all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors]." (2 employees in unit)

2973-10-R: Judy Carrigan (Applicant) v. SEIU Local 1 Canada (Respondent) v. St. Charles Village Limited Partnership c.o.b. as St. Charles Village (Intervener) *(Granted)*

Unit: "all employees of St. Charles Village Limited Partnership c.o.b. as St. Charles Village in the City of Welland, save and except registered and graduate nurses, office and clerical staff, security personnel, supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (20 employees in unit)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	8
Number of ballots marked against respondent	13
Number of ballots segregated and not counted	0

0954-11-R: Brandy Perry and Employees of Hawk Residential Care and Treatment Homes Inc. (Applicant) v. Service Employees International Union Local 1 Canada (Respondent) v. Hawk Residential Care and Treatment Homes Inc. (Intervener) *(Granted)*

Unit: "all employees of Hawk Residential Care and Treatment Homes Inc. in the City of Kawartha Lakes save and except house supervisor and persons above the rank of house supervisor." (37 employees in unit)

Number of names of persons on revised voters' list	36
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	14
Number of ballots segregated and not counted	0

1007-11-R: J. Cindy Ferguson (Applicant) v. Ontario Public Service Employees Union Local 355 (Respondent) v. The John Howard Society of Simcoe & Muskoka (Intervener) *(Granted)*

Unit: "all employees of the John Howard Society of Simcoe & Muskoka, in the County of Simcoe, save and except supervisors, persons above the rank of supervisor, Financial co-ordinator, administrative assistant and students." (7 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	4
Number of ballots segregated and not counted	0

1156-11-R: Beverley Ladouceur employee of Nutra Services at Villa Care Centre (Applicant) v. Service Employees International Union Local 1 Canada (Respondent) *(Withdrawn)*

1195-11-R: Alex Menezes, on his own behalf and on behalf of a group of employees of Capital Sports Properties Inc. (Applicant) v. Canadian Union of Public Employees, Local 4266-02 (Respondent) v. Capital Sports Properties Inc. (Intervener) *(Granted)*

Unit: "all Conversion employees of Capital Sports Properties Inc. employed at the Scotiabank Place in the City of Ottawa, save and except supervisors and persons above the rank of supervisor." (45 employees in unit)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	9
Number of ballots segregated and not counted	0

COMPLAINTS OF UNFAIR LABOUR PRACTICE

4200-04-U; 4215-04-U: Wal-Mart Canada Corp. (Applicant) v. UFCW Canada (Respondent); UFCW Canada (Applicant) v. Wal-Mart Canada Corp. (Respondent) *(Dismissed)*

0666-08-U: Wenda Sykes-Fairservice (Applicant) v. Superior-Greenstone ETFO (Respondent) v. Superior-Greenstone District School Board (Intervener) *(Dismissed)*

1354-08-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 1652472 Ontario Inc. and, Michelle Isbester (Respondent) *(Granted)*

0004-09-U: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. J.D. Strachan Construction Limited (Respondent) *(Terminated)*

2323-09-U: United Food and Commercial Workers International Union ("UFCW Canada") (Applicant) v. Wal-Mart Canada Corp. (Respondent) *(Withdrawn)*

2388-09-U: Universal Workers Union, Labourers International Union of North America, Local 183 on its own behalf and on behalf of its Members and Executive Board (Applicant) v. Labourers International Union of North America, Joseph S. Mancinelli, Ronald A. Pink, Q.C. and, Cosmo Manella (Respondent) v. Jack Oliveira and Luis Camara (Intervener) *(Withdrawn)*

3379-09-U: Teamsters Local Union 91 ("Local 91") (Applicant) v. Boldrick Bus Services Limited (Respondent) *(Dismissed)*

3526-09-U; 0712-11-U; 0787-11-U: Workers United Ontario Council (Applicant) v. Niagara 21st Group Inc., c.o.b. as The Courtyard by Marriott (Respondent) v. UNITE HERE (Intervener) *(Withdrawn)*

0460-10-U: Dr. René Gagné (Applicant) v. Algoma University College Faculty Association (Respondent) *(Dismissed)*

0610-10-U: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Janick Electric Limited (Respondent) *(Withdrawn)*

1012-10-U: Carlos Medeiros (Applicant) v. United Food and Commercial Workers Union Local 333 (Respondent) v. Maple Leaf Sports & Entertainment Ltd. (Intervener) *(Dismissed)*

1154-10-U: Mark Carter (Applicant) v. Elementary Teachers' Federation of Ontario (ETFO) (Respondent) *(Dismissed)*

1641-10-U: Curtis Steeves (Applicant) v. C.A.W. Local 524 (Respondent) *(Dismissed)*

2326-10-U: Alison Dalrymple (Applicant) v. Canadian Union of Public Employees (Respondent) v. 412506 Ontario Ltd. Foyer St. Jacques Nursing Home (Intervener) *(Dismissed)*

2455-10-U: Louie Senia (Applicant) v. Ontario Public Service Employee's Union (Respondent) v. Kinark Child and Family Services (Intervener) *(Granted)*

2507-10-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 989771 Ontario Ltd. o/a W.F. Rothdeutsch and Sons (Respondent) *(Withdrawn)*

2534-10-U: John White (Applicant) v. Toronto Civic Employees' Union Local 416 – CUPE (Respondent) v. City of Toronto (Intervener) *(Dismissed)*

2588-10-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Agrium Advanced Technologies Inc. (Respondent) *(Withdrawn)*

2711-10-U: Bruce Power LP (Applicant) v. The Society of Energy Professionals (Respondent) *(Withdrawn)*

2718-10-U: Nkumu Assana Kirika (Applicant) v. L'Association des enseignantes et des enseignants franco-ontariens (Respondent) v. Conseil des écoles catholiques du Centre- Est (Intervener) *(Dismissed)*

2729-10-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Surteco Canada Ltd. (Respondent) *(Withdrawn)*

2795-10-U: Yuet O Chan (Applicant) v. Amalgamated Transit Union, Local 113 (Respondent) v. Toronto Transit Commission (Intervener) *(Dismissed)*

3040-10-U: Service Employees International Union Local 1 Canada (Applicant) v. St. Charles Village Limited Partnership c.o.b. as St. Charles Village (Respondent) *(Withdrawn)*

3114-10-U: Mary Santarossa (Applicant) v. Canadian Union of Public Employees, Local 543 (Respondent) v. The Corporation of the City of Windsor (Intervener) *(Dismissed)*

3312-10-U: Conrad Gareau (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Toronto East Detention Centre (Intervener) *(Dismissed)*

3482-10-U: Labourers' International Union of North America, Local 625 (Applicant) v. A & C Grossi Construction Ltd., Anthony Grossi and Carl Grossi (Respondent) *(Withdrawn)*

3678-10-U; 3679-10-U: Siegfried Kohlhammer (Applicant) v. Modern Railings & Metalcraft Ltd. (Respondent) v. Shopmen's Local Union No. 834 of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers (Intervener); Siegfried Kohlhammer (Applicant) v. Shopmen's Local Union No. 834 of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers (Respondent) v. Modern Railings & Metalcraft Ltd. (Intervener) *(Dismissed)*

3785-10-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Hanwha L & C Canada Inc. (Respondent) *(Withdrawn)*

3983-10-U: United Food and Commercial Workers Canada, Local 175 (Applicant) v. National Car Rental (Canada) Inc. (Respondent) *(Withdrawn)*

4023-10-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. J.S. Mackay Heating Incorporated c.o.b. as Mackay Advanced Energies (Respondent) *(Withdrawn)*

4105-10-U: Gregory Jahn (Applicant) v. C.A.W. Local 4304 (Respondent) v. The Regional Municipality of Waterloo (Intervener) *(Withdrawn)*

4172-10-U: Public Service Alliance of Canada (Applicant) v. Ontario Lottery and Gaming Corporation c.o.b. OLG Slots at Rideau Carleton Raceway (Respondent) *(Withdrawn)*

4178-10-U: Service Employees International Union, Local 1 Canada (Applicant) v. Carmelite Day Nursery (Respondent) *(Withdrawn)*

4191-10-U: John Paul Garner (Applicant) v. Amalgamated Transit Union Local 107 (Respondent) v. City of Hamilton (Hamilton Street Railway) (Intervener) *(Dismissed)*

4278-10-U: David A. Dawson (Applicant) v. Canadian Union of Public Employees, Local One (Respondent) v. Toronto Hydro-Electric System Ltd. (Intervener) *(Dismissed)*

4290-10-U: Deborah Espinola-Buckingham (Applicant) v. CAW Local 973 (Respondent) v. Coca-Cola Brampton (Intervener) *(Terminated)*

4329-10-U: Tamara Rathbone, Terri-Buck-Orr, Dianne Musgrove, Cheryl Lauzon, Rob Enfield, Sandra Comisky (Applicant) v. Canadian Union of Public Employees Local 2165 (Respondent) *(Withdrawn)*

0011-11-U: Jose Vicente (Applicant) v. Canadian Construction Workers Union (Respondent) *(Withdrawn)*

0118-11-U: Romo Gualtieri and Aldo Isidori (Applicant) v. Teamsters Local Union No. 847 (Respondent) v. Maple Leaf Sports & Entertainment Ltd. (Intervener) *(Withdrawn)*

0250-11-U: Service Employees International Union Local 2, Brewery, General & Professional Workers' Union (Applicant) v. Cleanmatters Janitorial Services Limited and, Dustmoon Maintenance Ltd. (Respondent) *(Withdrawn)*

0453-11-U: Laurie Leakey (Applicant) v. Canadian Union of Public Employees Local 1480 (Respondent) v. Limestone District School Board (Intervener) *(Withdrawn)*

0510-11-U: Lisa Bolton (Applicant) v. Seasons Retirement Communities (Respondent) v. Service Employees International Union, Local 1 Canada (Intervener) *(Withdrawn)*

0559-11-U: Canadian Union of Public Employees (Applicant) v. Turtle Island Recycling Corporation (Respondent) *(Dismissed)*

0699-11-U: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Phazer Electric Ltd. (Respondent) *(Terminated)*

0728-11-U: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Ark-Tech Contracting Ltd. c.o.b. as Ark-Tech Electric (Respondent) *(Withdrawn)*

0867-11-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Joriki Inc. (Respondent) *(Withdrawn)*

0881-11-U: Marion Grin (Applicant) v. Teamsters Local Union 847 (Respondent) v. Stericycle Inc. (Intervener) *(Dismissed)*

0921-11-U: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. TCG Steel Enterprises Inc. (Respondent) *(Granted)*

0945-11-U: International Association of Machinists and Aerospace Workers (Applicant) v. Total Care Transport Services Inc. (Respondent) *(Terminated)*

0990-11-U: Teamsters Local Union 938 (Applicant) v. 1241554 Ontario Inc. o/a AM Transport (Respondent) *(Withdrawn)*

1051-11-U: International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 357 (Applicant) v. Stratford Shakespearean Festival of Canada (Respondent) *(Withdrawn)*

1066-11-U: Teamsters Local Union 938 (Applicant) v. L.V. Rose Int. TR. Ltd. o/a RTL – Reliable Transportation Link (Respondent) *(Withdrawn)*

1127-11-U: David Ford (Applicant) v. Amalgamated Transit Union, Local 113 (Respondent) v. York BRT Services (Intervener) *(Withdrawn)*

1142-11-U: Ontario Public Service Employees Union (Applicant) v. The John Howard Society of Simcoe & Muskoka (Respondent) v. J. Cindy Ferguson and a Group of Employees (Intervener) *(Withdrawn)*

1198-11-U: Ontario Nurses' Association (Applicant) v. Bethesda Community Services of Niagara Inc. and, Bethesda Home for the Mentally Handicapped Inc. (Respondent) *(Withdrawn)*

1235-11-U: Kel-Gor Limited (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 663 and Charlie Dunn and Paul Mussio (Respondent) *(Withdrawn)*

APPLICATION FOR INTERIM ORDER

0899-11-M: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Phazer Electric Ltd. (Respondent) *(Terminated)*

1091-11-M: Universal Workers Union, Labourers' International Union of North America, Local 183 on its own behalf and on behalf of its Members and Executive Board (Applicant) v. Labourers International Union of North America, Joseph S. Mancinelli, Ronald A. Pink, Q.C., and, Cosmo Mannella (Respondent) v. Jack Oliveira and Luis Camara (Intervener) *(Dismissed)*

JURISDICTIONAL DISPUTES

2174-10-JD: IBEW Electrical Power Council of Ontario International Brotherhood of Electrical Workers, Local 894 (Applicant) v. Black & McDonald Ltd., International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Respondent) v. Electrical Power Systems Construction Association (Intervener) *(Dismissed)*

2205-10-JD: Labourers' International Union of North America, Local 506 (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 27, Board of Governors of Exhibition Place (Respondent) *(Dismissed)*

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

4022-05-M; 1485-06-M; 0930-07-M: Orillia Soldiers' Memorial Hospital (Applicant) v. Ontario Nurses' Association (Respondent) *(Terminated)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1732-10-OH: Mark Lewkowicz (Applicant) v. PlusOne Inc. (Respondent) *(Withdrawn)*

1858-10-OH: Kyle MacDougall (Applicant) v. Stephen Caldwell, o/a Caldwell Enterprises (Respondent) *(Withdrawn)*

2730-10-OH: Steve Fairo and Dan Brown (Applicant) v. Surteco Canada Ltd. (Respondent) *(Withdrawn)*

4279-10-OH: Greg Rheaume (Applicant) v. Lowe's Companies Canada (Respondent) *(Dismissed)*

0256-11-OH: Carole McMillan (Applicant) v. Domco Foodservices Limited (Respondent) *(Withdrawn)*

0328-11-OH: Aline Kurik (Applicant) v. GW Pre-Employment Screening Inc. (Respondent) *(Terminated)*

0430-11-OH: Julian Kalac (Applicant) v. William Scotsman Inc. (Respondent) *(Withdrawn)*

1087-11-OH: Jeannette Lively (Applicant) v. Ministry of Community Safety and Correctional Services (Respondent) *(Withdrawn)*

CONSTRUCTION INDUSTRY GRIEVANCES

0506-06-G; 0507-06-G; 0508-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. City of Toronto (Respondent) *(Terminated)*

3940-07-G: Terrazzo, Tile & Marble Guild of Ontario Inc. (Applicant) v. Ontario Provincial Conference of the International Union of Brick and Allied Craftworkers and, Brick and Allied Craft Union of Canada and, Brick and Allied Craft Union of Canada, Local 31 (Respondent) *(Dismissed)*

1619-08-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Thyssenkrupp Elevators (Canada) Limited (Respondent) *(Dismissed)*

3297-09-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Associated Paving Company Ltd. (Respondent) *(Endorsed Settlement)*

3736-10-G: Sheet Metal Workers International Association, Local Union No. 47 (Applicant) v. Ventilation Evenflow Enr. (Respondent) *(Endorsed Settlement)*

4195-10-G: Labourers' International Union of North America, Local 506 (Applicant) v. Board of Governors of Exhibition Place (Respondent) *(Withdrawn)*

4272-10-G: International Association of Heat and Frost Insulators and Allied Workers, Local 95 (Applicant) v. Scotco Insulation Services (2004) Inc. (Respondent) *(Granted)*

4275-10-G: International Union of Painters and Allied Trades Local 1819 (Glaziers) (Applicant) v. 1440842 Ontario Inc. o/a KYIV Architectural Metals (Respondent) *(Granted)*

0003-11-G: Labourers' International Union of North America, Local 506 (Applicant) v. Board of Governors of Exhibition Place (Respondent) *(Withdrawn)*

0290-11-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Orta Forming & Construction Limited (Respondent) v. The Residential Low Rise Forming Contractors Association of Metropolitan Toronto and Vicinity (Intervener) *(Withdrawn)*

0760-11-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Schindler Elevator Corporation (Respondent) *(Withdrawn)*

0830-11-G: Labourers' International Union of North America, Local 493 (Applicant) v. M & G Fencing Inc. (Respondent) *(Granted)*

0844-11-G: Carpenters District Council of Ontario, Local Union 93 (Applicant) v. 1799784 Ontario Ltd. o/a Trevnor Construction, Trevor Smith (Director) and, Christine Dawood (Director) (Respondent) *(Endorsed Settlement)*

0937-11-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Charles Doiron c.o.b. as Abaco Glass & Mirror (Respondent) *(Withdrawn)*

0981-11-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. The State Group Inc. (Respondent) *(Withdrawn)*

0993-11-G: International Union of Elevator Constructors, Local 50 (Applicant) v. ThyssenKrupp Elevator (Canada) Ltd. (Respondent) *(Withdrawn)*

1014-11-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Pancor Industries Limited and, Lorenzo Panarase (Respondent) *(Granted)*

1020-11-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Benforest Developments Inc. and, Brian J. Cater (Respondent) *(Granted)*

1046-11-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 67 (Applicant) v. Mainway Industrial Installations Inc. (Respondent) *(Granted)*

1055-11-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canco Aluminum Inc. (Respondent) *(Withdrawn)*

1104-11-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Cro Aluminum Inc. and, Aluminum Pro Inc. (Respondent) *(Granted)*

1114-11-G: Canadian Union of Skilled Workers (Applicant) v. Langley Utilities Contracting Ltd. (Respondent) *(Endorsed Settlement)*

1122-11-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. PNR RailWorks Inc. (Respondent) *(Withdrawn)*

1126-11-G: International Union of Operating Engineers, Local 793 (Applicant) v. Lake Excavating & Contracting Inc. (Respondent) *(Granted)*

1132-11-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. H.B. White Canada Corporation (Respondent) *(Withdrawn)*

1140-11-G: International Union of Operating Engineers, Local 793 (Applicant) v. Jones Group Ltd. (Respondent) *(Granted)*

1165-11-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Board of Governors of Exhibition Place (Respondent) *(Withdrawn)*

1168-11-G: Construction Workers Union Local 150 (affiliated with Christian Labour Association of Canada) (Applicant) v. Rankin Construction Inc. (Respondent) *(Withdrawn)*

1182-11-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67 (Applicant) v. Jacobs Industrial Services Limited (Respondent) *(Withdrawn)*

1186-11-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67 (Applicant) v. Comstock Canada Ltd. (Respondent) *(Withdrawn)*

1193-11-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. 1371103 Ontario Inc. o/a Pro Group (Respondent) *(Granted)*

1197-11-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Scott Lath Plaster & Acoustics Ltd. (Respondent) *(Granted)*

1208-11-G: Labourers' International Union of North America, Local 625 (Applicant) v. A & C Grossi Construction Limited (Respondent) *(Withdrawn)*

1236-11-G: The International Union of Painters and Allied Trades, Local Union 114 (Applicant) v. Brett Doucette and Ryan Sutton c.o.b. as High Tech Glass (Respondent) *(Granted)*

1241-11-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Denhall Construction Inc. (Respondent) *(Endorsed Settlement)*

1287-11-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Dan Rajkovic c.o.b. as Dinamo Construction (Respondent) *(Granted)*

1329-11-G: The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) v. Taydan Glass Inc. (Respondent) *(Granted)*

1347-11-G: The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) v. Welland Glass & Entrances Inc. (Respondent) *(Granted)*

APPEALS - EMPLOYMENT STANDARDS ACT

0785-09-ES: Gurbachan Chadha (Applicant) v. Primary Response Inc. and, Director of Employment Standards (Respondent) *(Withdrawn)*

3955-09-ES: Allen Hayter a Director of Huron Tract Holdings Inc. (Applicant) v. Elaine Fraser and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0118-10-ES: RLM Manufacturing Inc. (Applicant) v. John Dykstra and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0260-10-ES: Amelia G. Basingan (Applicant) v. Harvey Gefen and Sylvia Gefen and, Director of Employment Standards (Respondent) *(Withdrawn)*

0264-10-ES: 1022239 Ontario Inc. o/a Seventy-Five Hundred Taxi Inc. (Applicant) v. Jeremy Bond, Mark Brown, Stephan Doyle, Gregg Gapp, Paul Gibson, Don Ingram, Robert McIntomney, Douglas Nethery, William Reid, Douglas Sharrard, Peter Strachan, Timothy Wipp, Robert Horton, Douglas Richard, Gerald Stubbington, John Kendrick, Stephen Walls, Dawson Lisinchuk, Nick Scali, Alice Shymanski, Stephanie Howard, Brad Lacell, Stewart Szostak, Richard Wipp, Jason Whalen, Gord Scott, Sam Foglia, Darren Patry, Jim Wadas, Shaun McKay, Luke Smith, Patricia Squires, Raymond Saylor, Rimas Gasperas, Ed Lay, Mike Supica, Rob Stancati, Harold Duguay, Jeff Couturier, Kerry Barnum, Ron White, Ian Sharpe, Darcy Bartlett, James Grant, Brandon Printess and, Director of Employment Standards (Respondent) *(Dismissed)*

0495-10-ES: 1738374 Ontario Ltd. o/a Cora Breakfast and Lunch (Applicant) v. Porsha Gamble and, Director of Employment Standards (Respondent) *(Granted)*

0567-10-ES; 1511-10-ES; 1512-10-ES: Vantai Tran (Applicant) v. 881063 Ontario Limited o/a Sam Woo Seafood Restaurant and, Director of Employment Standards (Respondent); Yin Xin Yue (Applicant) v. 881063 Ontario Limited o/a Sam Woo Seafood Restaurant and, Director of Employment Standards (Respondent); Guang Ming Zhou (Applicant) v. 881063 Ontario Limited o/a Sam Woo Seafood Restaurant and, Director of Employment Standards (Respondent) *(Withdrawn)*

1261-10-ES: Adrian Ingrand (Applicant) v. Kang's Packaging Solutions Inc., Director of Employment Standards (Respondent) *(Granted)*

1371-10-ES: Kyle MacDougall (Applicant) v. John S. A. Caldwell Enterprises Ltd. and, Director of Employment Standards (Respondent) *(Withdrawn)*

1549-10-ES: Lilia Tchernev (Applicant) v. Synergex Corporation and, Director of Employment Standards (Respondent) *(Granted)*

1730-10-ES: 1630897 Ontario Ltd. o/a A Touch of Grace Day Spa Inc. (Applicant) v. Fiona Morgan and, Director of Employment Standards (Respondent) *(Dismissed)*

1746-10-ES: Alexander Mark Maudsley o/a Environment First Lawncare (Applicant) v. Richard Emms and, Director of Employment Standards (Respondent) *(Withdrawn)*

2131-10-ES: Niagara Granite & Marble Ltd. (Applicant) v. Sasha de Moel and, Director of Employment Standards (Respondent) *(Dismissed)*

2478-10-ES: R.W. Tomlinson Inc. o/a Ontario Trap Rock (Applicant) v. Henk Van Delft and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

2805-10-ES: Auto Group Newmarket Inc. operating as Newmarket Toyota Inc. (Applicant) v. Brian Jones, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

2812-10-ES: Mae Sajorne (Applicant) v. Shiraz Lakhani and Shamim Mawji and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

2928-10-ES: R.J. MacLeod Holdings Ltd. o/a Tim Horton Donuts (Applicant) v. Tasha F. McClelland and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3024-10-ES: 1363641 Ontario Limited operating as Amar Optical (Applicant) v. Jennifer Galea-Sortino and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3055-10-ES: Dilanka Dayaratne (Applicant) v. Symcor Inc., and Director of Employment Standards (Respondent) *(Dismissed)*

3063-10-ES: NS Technologies Group Inc. (Applicant) v. Joe Moon Pang Tse, Director of Employment Standards (Respondent) *(Withdrawn)*

3069-10-ES: Shiraz Lakhani and Shamim Mawji operating as Shiraz Lakhani and Shamim Mawji (Applicant) v. Mae Sajorne and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3121-10-ES: Dahdria A. Miller (Applicant) v. Compass Hill Hospitality Inc. o/a McDonalds, and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3127-10-ES: The Apollo Restaurant and Tavern (Applicant) v. Ashley Pleasant and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3205-10-ES: Jo Bistro Inc. (Applicant) v. Nathalie Tremblay and, Director of Employment Standards (Respondent) *(Withdrawn)*

3260-10-ES: Transmitter Studios Inc. (Applicant) v. Anna Robertson and, Director of Employment Standards (Respondent) *(Granted)*

3441-10-ES: Jerry Kwok Keung Yung (Applicant) v. CCN Media Inc. and, Director of Employment Standards (Respondent) *(Dismissed)*

3450-10-ES: 1120423 Ontario Limited operating as Comda the Calendar People (Applicant) v. Carlos Andrade, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3455-10-ES: Adel Guirguis (Applicant) v. Margaret Ann Keast and Karen Heather McNeil/ Toucan Communication, and Director of Employment Standards (Respondent) *(Dismissed)*

3456-10-ES: Big Narrows Resort Inc. (Applicant) v. Heather Gibb and, Director of Employment Standards (Respondent) *(Terminated)*

3495-10-ES: 3005981 Nova Scotia Ltd. o/a Continental Connections Ltd. (Applicant) v. Peter Wischnewsky, and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3514-10-ES: Donnie McLean and Maxine Bowman o/a D & D Health Services (Applicant) v. Phillipa Taylor and, Director of Employment Standards (Respondent) *(Withdrawn)*

3548-10-ES: Jessica Clarke (Applicant) v. 2162394 Ontario Inc. o/a Hot Breads, and Director of Employment Standards (Respondent) *(Dismissed)*

3550-10-ES: Rina Otero (Applicant) v. Jennyfer Ann Cruz, and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3600-10-ES: Adele Monaco Criminal Lawyer (Applicant) v. Elena Santiago and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3608-10-ES: Benson Group Inc. (Applicant) v. Ernest Amos and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3649-10-ES: James Rozario (Applicant) v. 1761146 Ontario Inc. o/a Stix 'N' Stones, and Director of Employment Standards (Respondent) *(Granted)*

3709-10-ES: 6076416 Canada Inc. o/a Fynn's of Temple Bar (Applicant) v. Erick Aguilar and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3737-10-ES: Kennedy Club Inc. operating as Kennedy's Adult Entertainment (Applicant) v. Patricia Krumpek and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3739-10-ES: Kennedy Club Inc. operating as Kennedy's Adult Entertainment (Applicant) v. Geraldine Newman and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3776-10-ES: The Prim8 Group Inc. (Applicant) v. Lacey M.C. McBane and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3786-10-ES: 636706 Ontario Ltd. o/a Curves (Applicant) v. Elizabeth Vulvoski, and Director of Employment Standards (Respondent) *(Dismissed)*

3831-10-ES: M & Co. Chartered Accountants Professional Corporation (Applicant) v. Umang Patel and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3868-10-ES: Steven Clinkinboomer (Applicant) v. Condie Automotive Ltd. and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3891-10-ES: Jason Vey, a Director of JMV Construction (Applicant) v. Paul Froman and, Director of Employment Standards (Respondent) *(Granted)*

3926-10-ES: Nor-Don Collection Network Inc. (Applicant) v. Renuka Janki and, and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

4040-10-ES: Frank Trachuk (Applicant) v. Xentel DM Incorporated, and Director of Employment Standards (Respondent) *(Dismissed)*

4062-10-ES: M J R Pharmacy Inc. operating as Shopper's Drug Mart #1387 (Applicant) v. Sauna Jones and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

4186-10-ES: Cedric Colond (Applicant) v. Sodexo Canada Ltd. operating as Tim Horton's and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

4190-10-ES: Di-Cut Industries Limited (Applicant) v. Eliseo Banaag and, Director of Employment Standards (Respondent) *(Granted)*

4280-10-ES: 581917 Ontario Inc. operating as Thorold Auto Parts & Recyclers (Applicant) v. William Reid and, Director of Employment Standards (Respondent) *(Withdrawn)*

4307-10-ES: Arlie's Sport Shop Downtown Ltd. (Applicant) v. Rochelle Deldonne and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

4309-10-ES: 6838979 Canada Corp. operating as Pioneer Snack Express (Applicant) v. Marilyn Durham and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

4320-10-ES: 1567312 Ontario Inc. o/a Grade Expectations - Windsor (Applicant) v. Stephanie Douglas, and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0017-11-ES: Tribute Window Coverings Inc. (Applicant) v. Flutra Bushi and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0113-11-ES: Riyad B. Zubaydi (Applicant) v. Granite Design Works Inc. and, Director of Employment Standards (Respondent) *(Withdrawn)*

0130-11-ES: Ping Li (Applicant) v. 1429481 Ontario Inc. o/a Pathway Communications and, Director of Employment Standards (Respondent) *(Dismissed)*

0151-11-ES: Kenneth B. Grant, a director of Magnetic North Post (Applicant) v. John D. Whish, Craig Wallace, Ben Bratzel, Paul Deakin, Kyoung K. Chung, Daniel MacEachren, Erica Pascalides and, Director of Employment Standards (Respondent) *(Terminated)*

0169-11-ES: North York General Hospital (Applicant) v. Maqsud Patel and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0227-11-ES: Marie Moreau (Applicant) v. 1060894 Ontario Inc. o/a Barrs Motel and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0239-11-ES: Andre Rattan (Applicant) v. 1151058 Ontario Inc. o/a L & K Industries and, Director of Employment Standards (Respondent) *(Withdrawn)*

0336-11-ES: PPG Management Ltd. operating as Summerhill Property Management (Applicant) v. Patricia Startup and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0359-11-ES: Frank Fontana (Applicant) v. Incredible Printing Company Inc. and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0385-11-ES: Canadian Drives Inc. (Applicant) v. Shailesh Nair, and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0390-11-ES: Michiko Hirohashi (Applicant) v. Katz Group Canada Ltd. o/a Pharma Plus Drugmarts Ltd. and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0403-11-ES: KMH Cardiology Centres Incorporated Operating as KMH Cardiology and Diagnostic Centre (Applicant) v. Kim Adair and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0432-11-ES: James Payne Operating as James Payne Enterprises (Applicant) v. Steve Shillolo, Director of Employment Standards (Respondent) *(Dismissed)*

0436-11-ES: Atanas Lalev (Applicant) v. Magna Exteriors and Interiors Corp. o/a Polycon Industries and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0475-11-ES: 1639329 Ontario Ltd. operating as Royal Lancaster (Applicant) v. Bill (Vassilios) Costoglou and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0476-11-ES: Hudson's Bay Company / Compagnie De La Baie D'Hudson operating as Hudson's Bay Company (Applicant) v. Susan Mang and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0499-11-ES: Ultimate Golf Centers Inc. o/a Ultimate Sportsplex (Applicant) v. Ramadan Mustafa and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0527-11-ES: Amanda E. Gidaro (Applicant) v. 2187030 Ontario Inc. o/a Fabutan and, Director of Employment Standards (Respondent) *(Withdrawn)*

0548-11-ES: Melody Lefebvre (Applicant) v. Bill G. Lefebvre o/a A 1 Terminator, and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0569-11-ES: Sidhu & Sons Investments Ltd. (Applicant) v. Ally Hazeer, and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0571-11-ES: Distinct Healthcare Services Inc. (Applicant) v. Harmanpreet Sandhu and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0575-11-ES: Melissa Phillippe-Fedee (Applicant) v. Data Integrity Inc. and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0589-11-ES: Ridge Tech Dental Laboratory Inc. (Applicant) v. Edward Weimin Xu and, Director of Employment Standards (Respondent) *(Withdrawn)*

0590-11-ES: Lucinda Tesch (Applicant) v. Startek Canada Services, Ltd. and, Director of Employment Standards (Respondent) *(Withdrawn)*

0620-11-ES: 1815578 Ontario Inc. Ray Daniel Salon & Spa (Applicant) v. Esfahani Faizi Amaneh and, Director of Employment Standards (Respondent) *(Terminated)*

0682-11-ES: Victor Paul and Joel Wagman, directors of First Waste Transload Inc. (Applicant) v. Jose G. Augusto, Patricia Riethmueller and, Director of Employment Standards (Respondent) *(Terminated)*

0705-11-ES: Chris Douglas a Director of Fit-Mass Nutrition Ltd. (Applicant) v. Narges Raoufi and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0715-11-ES: 1238566 Ontario Inc. o/aThe Daily Grill Restaurant (Applicant) v. Jillian Schill, and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0750-11-ES: Michelle May Riley, Director of R. Bros. Electrical Group Inc. (Applicant) v. Kastriot Mustafa and, Director of Employment Standards (Respondent) *(Dismissed)*

0755-11-ES: Muhammad Yameen Khan (Applicant) v. Martinrea International Inc. o/a M J Manufacturing, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0791-11-ES: Amr Robah (Applicant) v. Jason Howes and, Director of Employment Standards (Respondent) *(Terminated)*

0813-11-ES: Steeles Deli Warehouse (1989) Inc. (Applicant) v. Melinda Drake and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0816-11-ES: Todo Inc. (Applicant) v. Geoffrey Mark Weston and, Director of Employment Standards (Respondent) *(Dismissed)*

0851-11-ES: Accurassay Laboratories Ltd. (Applicant) v. Paul Edwards and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0852-11-ES: XL Digital Services Inc. o/a XL Digital (Applicant) v. Paul Colley and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0865-11-ES: Budds' Collision Services Ltd. (Applicant) v. Leon A. Peters and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0878-11-ES: SEO Leasing Corporation (Applicant) v. Joji E Trabado and, Director of Employment Standards (Respondent) *(Terminated)*

0886-11-ES: Kenneth White, a Director of Muskoka Granite Thinstone Inc. (Applicant) v. Justin Towns, and Director of Employment Standards (Respondent) *(Terminated)*

0924-11-ES: Adrenalinfitness.com Ltd. (Applicant) v. Ngan Thi Tran and, Director of Employment Standards (Respondent) *(Terminated)*

0941-11-ES: Jennifer Keeling o/a JP's Hair & Aesthetics (Applicant) v. Normand Poirier, Director of Employment Standards (Respondent) *(Dismissed)*

0946-11-ES: Herbert Chambers, a director of 1215223 Ontario Ltd. o/a Chambers Family Farm (Applicant) v. Hilary Woods and, Director of Employment Standards (Respondent) *(Terminated)*

0950-11-ES: Eric Secord operating as Everything Computers & Electronics (Applicant) v. Matthew A. Alden and, Director of Employment Standards (Respondent) *(Terminated)*

0963-11-ES: Costa verde B.B.Q. Chicken Inc. (Applicant) v. Laurinda Ferreira, and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0974-11-ES: Herbert William Taylor, a director of Addmore Office Furniture Inc. (Applicant) v. Rui Carvalho, Rodney Carvalho, John Coke, Donald Coles, Paula Cristiano, Bruno D'Andrea, Paul Desouza, Glenn Elliott, Peter Koo, William Kuchar, Neils Lutterrodt, Devon Elson McAlister, Ian McMillian, John Naylor, Sam Rizza, Larry Routliffe, Terrance Thorpe, Paul Tricker, Joseph Wie-Addo, Anthony Williams, Lynda Yurkovich, Director of Employment Standards (Respondent) *(Withdrawn)*

1018-11-ES: J & S Capital Corp. (Applicant) v. Codie Roach, Director Of Employment Standards (Respondent) *(Terminated)*

1032-11-ES: Paula Meier Associates Inc. (Applicant) v. Linda Brown and, Director of Employment Standards (Respondent) *(Terminated)*

1033-11-ES; 1034-11-ES; 1035-11-ES: Miska Trailers (Applicant) v. Van Tran, Director of Employment Standards (Respondent); Miska Trailers (Applicant) v. Alex Giulekas, Director of Employment Standards (Respondent); Miska Trailers (Applicant) v. Dustin Wooldridge, Director of Employment Standards (Respondent) *(Terminated)*

1039-11-ES: Sherry Mayhew (Applicant) v. Grail Springs Health & Wellness Spa Inc. and, Director of Employment Standards (Respondent) *(Terminated)*

1107-11-ES: 2252377 Ontario Inc. (Applicant) v. Director of Employment Standards (Respondent) *(Terminated)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

1823-10-HS: Vince Lauria (Applicant) v. Toronto West Detention Centre and, Doug Kariam, Inspector (Respondent) *(Dismissed)*

4141-10-HS: City of Toronto (Applicant) v. OJCR Construction Limited, Dennis Wilson, Inspector (Respondent) *(Terminated)*

4164-10-HS: Give and Go Prepared Foods Corp. (Applicant) v. Michael Rouatt, Inspector (Respondent) *(Withdrawn)*

4202-10-HS: LifeLabs (Applicant) v. Ronnie Lucas, Inspector (Respondent) *(Withdrawn)*

0488-11-HS: Winroc, a division of Superior Plus LP (Applicant) v. Phillip Ferreira, Inspector (Respondent) *(Terminated)*

0846-11-HS: CSH Oak Park LaSalle Inc. (Applicant) v. C.A.W. Local 2458, R. Taggart, Inspector (Respondent) *(Dismissed)*

1163-11-HS: Frecon Construction Limited (Applicant) v. Jason Williams, Inspector (Respondent) *(Terminated)*

1176-11-HS: Dollarama L.P. (Applicant) v. Lourdes Marcelo and, Yvonne Moy, Inspector (Respondent) *(Dismissed)*

COMPLAINTS UNDER THE PUBLIC INQUIRIES ACT

0939-11-PI: Omnia Mohamed Refat (Applicant) v. Islamic School of Hamilton (ISH) part of the Muslim Association of Hamilton (MAH) (Respondent) *(Dismissed)*

FIRST AGREEMENT - DIRECTION

0853-11-FC: Workers United Canada Council (Applicant) v. Niagara 21st Group Inc. c.o.b. as the Courtyard by Marriott (Respondent) *(Withdrawn)*

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

1275-09-PS: Ontario Nurses' Association (Applicant) v. Hamilton Health Sciences and, ONE Fertility Clinic (Respondent) v. Ontario Public Service Employees Union, Canadian Union of Public Employees (Intervener) *(Dismissed)*

Unit: "Nurses Unit all Registered Nurses and all Nurses with a Temporary Certificate of Registration employed by ONE Fertility Clinic in the City of Burlington engaged in a nursing capacity, save and except supervisor and persons above the rank of supervisor. Paramedical Unit all paramedical employees of ONE Fertility Clinic in the City of Burlington including but not limited to Andrologists, Embryologists, Phlebotomists, Ultrasound Technologists, and Pharmacy Technicians save and except supervisors and persons above the rank of supervisor. Service/Clerical Unit all employees of ONE Fertility Clinic in the City of Burlington employed in a service, office or clerical capacity save and except supervisors, persons above the rank of supervisor, professional medical staff, Registered Nurses and Nurses with a Temporary Certificate of Registration, paramedical employees, and Health Professionals other than Registered Practical Nurses." (28 employees in unit)

1366-09-PS: Ontario Public Service Employees Union (Applicant) v. ONE Fertility Clinic and, Hamilton Health Sciences (Respondent) v. Ontario Nurses' Association, Canadian Union of Public Employees (Intervener) *(Granted)*

2398-10-PS: Ontario Nurses' Association (Applicant) v. Lakeridge Health Corporation and, Central East Community Care Access Centre (Respondent) v. Canadian Union of Public Employees, Ontario Public Service Employees Union (Intervener) *(Withdrawn)*

3693-10-PS: Ontario Public Service Employees Union (Applicant) v. Children's Centre Thunder Bay and, North of Superior Community Mental Health Program Corporation and, Canadian Union of Public Employees and its Local 3253 (Respondent) *(Withdrawn)*

3860-10-PS: Canadian Mental Health Association, Lambton Kent Branch (Applicant) v. Service Employees International Union, Local 1 Canada; and, Ontario Public Sector Employees Union (Respondent) *(Granted)*

Unit: "all employees of Canadian Mental Health Association, Lambton Kent Branch, employed in the Municipality of Chatham Kent and the County of Lambton, save and except Supervisors, Program Leads and Managers, persons above the rank of Supervisor, Program Lead or Manager, Finance Clerks, Finance Analysts, Executive Assistants, Property and Housing Coordinators, Human Resources Coordinators, Cleaning and Maintenance employees, students employed pursuant to a cooperative education program and students employed during the school vacation period pursuant to external funding specifically provided for the employment of such students" (employees in unit)

REFERRAL FROM MINISTER (SECTION 115)

0932-11-M: Fort Erie Live Racing Consortium (Applicant) v. Service Employees International Union Local 2, Brewery, General & Professional Workers' Union (Respondent) *(Terminated)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

2980-07-U: Adhin Sukhu (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Centennial College of Applied Arts and Technology (Intervener) *(Withdrawn)*

1591-08-G: Canadian Union of Skilled Workers (Applicant) v. Ontario Power Generation Inc. (Respondent) (Disposition not vailable)

2324-09-ES: Eugenie Budulan (Applicant) v. Carlos Gallas, Director of Employment Standards (Respondent) *(Dismissed)*

2819-09-JD: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 2222 (Applicant) v. Hydro One Network Services, Skyway Canada Limited and, Labourers' International Union of North America, Local 1059 (Respondent) v. Electrical Power Systems Construction Association (Intervener) *(Dismissed)*

0572-10-ES: Energy Vision Inc. (Applicant) v. Sara Duncan and, Director of Employment Standards (Respondent) *(Granted)*

1569-10-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. 1000690 Ontario Inc. o/a Liza Homes (Respondent) *(Dismissed)*

1687-10-U: Ibrahim Ahmed (Applicant) v. UNITE Here Local 75 (Respondent) v. Toronto Hilton (Intervener) *(Dismissed)*

3649-10-ES: James Rozario (Applicant) v. 1761146 Ontario Inc. o/a Stix 'N' Stones, and Director of Employment Standards (Respondent) *(Granted)*

3719-10-ES: Husky Rent-A-Car Inc. o/a Husky Rent A Car and U-Haul (Applicant) v. Hong Ju Yang, and Director of Employment Standards (Respondent) *(Dismissed)*

0471-11-ES: Ugur Akdogan o/a Meet Point Restaurant & Grill House Inc. (Applicant) v. Cihan Demir and, Director of Employment Standards (Respondent) *(Dismissed)*

0941-11-ES: Jennifer Keeling o/a JP's Hair & Aesthetics (Applicant) v. Normand Poirier, D irector of Employment Standards (Respondent) *(Dismissed)*

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